Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MARK RICHARDSON,

Petitioner,

v.

STATE FARM FIRE & CASUALTY COMPANY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In the context of this court's decision in *Erie Railroad Company v. Tompkins* (1938) 304 US 64, may a Federal Court in deciding a substantive issue in a diversity case adopt and employ a rule of law which expressly contravenes the State substantive rule of law as declared by the applicable State Supreme Court? Specifically, may the Ninth Circuit employ the "but for" test so as to uphold a motor vehicle exclusion contained in a homeowner's insurance police despite the express rejection of that test by the California Supreme Court.

II.

THE NINTH CIRCUIT CONTRAVENED THE CALIFORNIA SUPREME COURT'S MANDATE THAT THE "BUT FOR" TEST NOT BE USED IN DETERMINING WHETHER AN ACT OF NEGLIGENCE WAS AN INDEPENDENT CONCURRENT CAUSE OF INJURY 11

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Mark Richardson, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above proceedings on March 8, 1994, and the denial of petitioner's petition for rehearing on April 15, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reprinted in the appendix hereto, p. 99a, *infra*.

The memorandum decision of the United States District Court for the Eastern District of California (The Honorable Oliver W. Wanger) is reprinted in the Appendix hereto, p. 1a, *infra*.

JURISDICTION

Following two years of extensive litigation in state court and on the eve of trial, petitioner Richardson obtained a California Judgment against respondent State Farm's insured, Linda Meaders, for One Million Dollars ($1,000.000.00), $25,000 of which was satisfied under a separate insurance policy. Petitioner sought to enforce the unsatisfied $975,000.00 portion of the judgment in a separate state court action against respondent State Farm pursuant to California Insurance Code §11580 and as assignee of Ms. Meaders' bad faith right of action against State Farm. (Appendix -District Court Opinion, p. 1a, 6a, District Court Undisputed Material Facts and Conclusions of Law, p. 57a, 58a, Judgment, p. 95a, 96a, Amendment, p. 97a, 98a.) Petitioner's action against State Farm had

been filed on February 28, 1991 in the Superior Court in and for the County of Tulare, California, and was removed to Federal Court by respondent, which invoked federal diversity jurisdiction under 28 U.S.C. §1332. (Appendix - Ninth Circuit Memorandum Opinion Reversing District Court Judgment, p. 101a, District Court Opinion, p. 1a, 2a, 6a, District Court Undisputed Material Facts and Conclusions of Law, p. 57a, 58a.)

On August 3, 1992, following cross-motions for summary judgment, the United States District Court for the Eastern District of California, the Honorable Oliver W. Wanger, Judge, entered summary judgment in favor of petitioner. (Appendix - District Court Opinion, p. 1a, District Court Undisputed Material Facts and Conclusions of Law, p. 40a, Judgment, p. 95a, Amendment to Judgment, p. 97a.) Respondent appealed, seeking reversal of the summary judgment in favor of petitioner and seeking a direction to the District Court to grant summary judgment in favor of respondent. The Ninth Circuit on March 8, 1994, reversed the judgment of the United States District Court and directed the United States District Court to enter summary judgment in favor of respondent. (Appendix - Ninth Circuit Memorandum Opinion Reversing District Court Judgment, p. 99a.) The Ninth Circuit on April 15, 1994, denied petitioner's

petition for rehearing. (Appendix - Ninth Circuit Denial of Rehearing, p. 107a.)

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. §1254(1).

UNITED STATES CONSTITUTIONAL PROVISION INVOLVED

Amendment 5

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

STATUTE INVOLVED

28 U.S.C. § 725

The laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

On April 30, 1988, when Mark Richardson was a 16-year-old minor, he was temporarily staying at the residence of State Farm's insured, Linda Meaders. Mark had a history of alcohol abuse, a fact known to Ms. Meaders. Ms. Meaders purchased and provided alcohol for Mark and other minor children temporarily staying with her. Mark consumed alcohol provided by Ms. Meaders on April 30, 1988. After having consumed the alcohol, and while under the influence of same, Mark began performing major engine repair on a van owned by Ms. Meaders. A fire occurred resulting in extreme and mutilating burn injuries to Mark. (Appendix - District Court Undisputed Material Facts and Conclusions of Law, p. 41a-45a, District Court Opinion, p. 2a, 3a.)

The underlying state court Complaint alleged that Ms. Meaders' negligent providing of alcohol to Mark Richardson, an alcohol-abusing minor, was a proximate cause of Mark's injuries. (Appendix - District Court Undisputed Material Facts and Conclusions of Law, p. 45a, 47a, District Court Opinion, p. 14a.) Respondent provided a homeowner's insurance policy to Ms. Meaders which insured her against personal liability, but contained an exclusion as to liability arising out of the ownership, maintenance or use of a motor vehicle (or supervision

with regard thereto). (Appendix - District Court Undisputed Material Facts and Conclusions of Law, p. 46a, District Court Opinion, p. 4a, 5a.) Under circumstances and allegations legally indistinguishable from the present case, the California Supreme Court previously ruled that such motor vehicle exclusion is no bar to coverage. (*State Farm Mutual Automobile Ins. Co. v. Partridge* (1973) 10 Cal.3d 94.)

In his summary judgment motion before the United States District Court, Mark contended, in accord with *Partridge*, that his injuries resulted from two independent, concurrent causes - both acts of negligence committed by State Farm's insured, Ms. Meaders. (Appendix - District Court Opinion, p. 6a.) One such act was covered by the subject insurance policy, i.e., negligently providing of alcohol to a known, alcohol-dependent minor. The other act of negligence was not covered, i.e., allowing an ill-trained and ill-equipped minor to perform dangerous repair to a motor vehicle. (Appendix - District Court Opinion, p. 4a.) Under *Partridge*, petitioner contended that these two separate acts of negligence were independent of each other because the occurrence of one did not depend upon the occurrence of the other. In other words, some type of injury could have resulted from either cause with or without the occurrence of the other.

Thus, *Partridge* affords coverage despite an excluded cause if there exists an independent concurrent covered cause.

State Farm argued, contrary to the express holding in *Partridge*, that "but for" the involvement of the motor vehicle, Mark would not have been injured. (Appendix - District Court Opinion, p. 7a, 9a, 14a, 15a.) By such improper application of the "but for" test, State Farm argued that the negligent providing of alcohol was not a cause independent of its insured's negligence as relates to the ownership, maintenance, use, entrustment or supervision of a motor vehicle.

The United States District Court granted petitioner's Motion for Summary Judgment on the ground that respondent had refused to defend its insured and refused to accept a reasonable settlement offer within policy limits, in the face of potential coverage. (Appendix - District Court Opinion, p. 25a, 33a, 38a, 39a, District Court Undisputed Material Facts and Conclusions of Law, p. 66a, 68a, 71a, 77a, 78a, 79a, 80a, 81a, 82a, 83a, 84a, 86a, 89a, 91a.) The potential coverage was based upon the existence of an independent concurrent cause of injury, i.e., providing alcohol to a known alcohol dependent minor, in addition to an excluded cause of injury, under the California rule of law established in *State Farm Mutual Automobile Ins. Co. v. Partridge* (1973) 10

Cal.3d 94. (Appendix - District Court Undisputed Material Facts and Conclusions of Law, p. 66a.) The *Partridge* test for the existence of an independent concurrent negligent cause of injury was whether there was an independent act of negligence which could have caused some injury in some fashion without involvement of the excluded cause of injury. The California Supreme Court in *Partridge* expressly rejected the notion that a "but for" test may be used to defeat the contention that an independent, concurrent, negligent cause existed. (See *Partridge* analysis - Part II *infra*).

On State Farm's appeal of the District Court judgment, the Ninth Circuit employed the mechanical "but for" test which had been expressly rejected by the California Supreme Court in *Partridge*. The Ninth Circuit determined that merely because Mark's particular injury did not occur but for the use of the vehicle, the furnishing of alcohol to Mark could not be considered an independent concurrent cause of injury, even though such furnishing could have caused injury to Mark in the absence of the use of the motor vehicle. The Ninth Circuit said, "Richardson's injuries could not have happened unless he had been engaged in maintaining the van or was negligently supervised in doing so." (Emphasis added.) (Appendix - Ninth Circuit Memorandum Opinion Reversing District Court Judgment, p. 106a.) In adopting

that reasoning, the Ninth Circuit expressly adopted and employed a rule of law contrary to the rule announced and employed by the California Supreme Court in *Partridge*. For that reason, Mark petitions this Court for a writ of certiorari.

REASONS FOR GRANTING WRIT

I.

THIS COURT'S HOLDING IN *ERIE RAILROAD COMPANY v. TOMPKINS* MANDATES THAT THE CIRCUIT COURTS FOLLOW SUBSTANTIVE STATE LAW AS DECLARED BY THE STATE SUPREME COURTS IN DIVERSITY CASES.

Erie Railroad Company v. Tompkins (1938) 304 US 64, held that in a diversity case the Federal Court deciding the case must apply the substantive law of the state which applies to the case. 28 U.S.C. §725, provides in substance that State law be regarded as furnishing the rule of decision in a trial at common law, except where the Constitution, treaties or statutes of the United States otherwise require. This Court held that such statute mandated the application of State law in a diversity case. If the rule were otherwise, this Court in *Erie* noted, then Federal Courts would be free to deviate from State

common law as declared by the highest State court; the result would be the discriminatory application of State law as between citizens and non-citizens of a State, leading to the denial of due process of law mandated by the Fifth Amendment to the United States Constitution.

Following *Erie*, this Court declared in *Guaranty Trust Co. of New York v. York* (1945) 326 US 99, 112, 65 S.Ct. 1464, 1471:

> The source of substantive rights enforced by a Federal Court under diversity jurisdiction . . .is the law of the States. Whenever that law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether that form of application is a State or a Federal Court and whether the remedies be sought at law or may be had in equity. (Emphasis added.)

This Court has therefore made it very clear that under the Erie Doctrine the Federal Courts are required to follow State law as declared by State Supreme Courts in diversity cases.

In this case, the California Supreme Court has expressly declared in *State Farm Mutual Automobile Ins. Co. v. Partridge* (1973) 10 Cal.3d 94, 105 fn. 11, that the

"but for" test is not to be used in determining whether a non-excluded act of negligence is an independent concurrent cause of injury (resulting in insurance coverage despite the existence of an excluded concurrent cause). The only test is whether the non-excluded act of negligence could have caused some injury (not necessarily the precise injury which occurred) in the absence of the excluded cause.

II.

THE NINTH CIRCUIT CONTRAVENED THE CALIFORNIA SUPREME COURT'S MANDATE THAT THE "BUT FOR" TEST NOT BE USED IN DETERMINING WHETHER AN ACT OF NEGLIGENCE WAS AN INDEPENDENT CONCURRENT CAUSE OF INJURY.

At age 16, petitioner, Mark Richardson, was mutilated by a fire encompassing more than 50% of his body. The accident occurred when gasoline spilled upon him and ignited while he was making repairs beneath an automobile owned by State Farm's insured, Linda Meaders. At the time of injury, Mark was impaired by alcohol which had previously been negligently furnished to him by the insured. Mark had a longstanding alcohol abuse problem, known to the insured. The insured was

not even home, let alone supervising, at the time of injury. (Appendix - District Court Opinion, p. 1a, 2a, 3a, District Court Undisputed Materials Facts and Conclusions of Law, p. 40a-45a, 54a, 55a, 66a.)

The minor filed an action against the insured, alleging that before the accident he was temporarily living with the insured, who had actual knowledge of the minor's alcohol abuse problems. The complaint further alleged that despite that knowledge, the insured purchased and provided alcohol to the minor. The insured admitted in her deposition testimony that prior to the subject accident, while the minor was living with her, she routinely made alcohol available to him and other minors living there. (Appendix - District Court Undisputed Materials Facts and Conclusions of Law, p. 40a-45a, 54a, 55a.)

The homeowner's carrier, State Farm, refused to defend its insured, raising the automobile exclusions. (Appendix - Excerpts of State Farm Homeowner's Insurance Policy, p. 109a, 110a, District Court Opinion, p. 4a, District Court Undisputed Material Facts and Conclusions of Law, p. 50a.) The exclusions purported to exclude coverage for injuries as follows:

1. "Arising out of the ownership, maintenance, use, loading or unloading of . . . a motor vehicle owned . . . by . . . any insured;"

2. "Arising out of" the entrustment to or negligent supervision of any person by any insured, "with regard to ownership, maintenance, or use of any . . . motor vehicle."

Petitioner obtained a judgment in state court for One Million Dollars ($1,000,000.00) against the insured Ms. Meaders. The minor then filed an action in state court against State Farm both directly under California Insurance Code Section 11580 and as assignee of Ms. Meaders' bad faith action against State Farm which removed this matter to Federal Court under diversity jurisdiction. Cross-motions for summary judgment were filed. The Honorable Oliver Wanger, Judge of the United States District Court, Eastern District of California, granted the minor's motion for summary judgment, finding that under the doctrine set forth in the California Supreme Court decision of *State Farm Mutual Auto. Ins. Co. v. Partridge* (1973) 10 Cal.3d 94, the exclusion in the homeowner's policy did not apply under the facts of this case. The Ninth Circuit has erroneously reversed the District Court's ruling, contravening the *Partridge* court's binding rejection of the mechanical "but for" causal analysis. The Ninth Circuit expressly adopted the "but for"

test, misreading a lower court case which itself misread *Partridge*. (Appendix - 9th Circuit Memorandum Opinion Reversing District Court Judgment, p. 106a.)

Partridge involved an insured (under a homeowner's policy) who negligently filed the trigger of a handgun to the point that it became a hair trigger. Thereafter, that same insured negligently drove his motor vehicle driving across country as he and his passenger were hunting rabbits. The negligent driving caused the gun to discharge, injuring the passenger. *Partridge* specifically held that the motor vehicle exclusion did not apply because the insured had committed an act of negligence - negligently filing the hair trigger - which was independent of (not dependent upon) the fortuitous involvement of the automobile.

Thus, for 21 years, the law of California has been well settled that a negligent act which is independent of, i.e., not dependent upon, negligent ownership, use, maintenance or supervision of a motor vehicle is not excluded under a homeowner's policy. Two acts are independent, as in the *Partridge* case, when one negligent act does not depend for its occurrence upon the happening of the other. Despite the fact that in *Partridge* the automobile caused the accident, the Court expressly rejected the "but for" argument propounded by the

insurance carrier (coincidentally - State Farm Fire & Casualty Company). In *Partridge*, State Farm argued without success that the negligent filing of the hair trigger could not have caused the injury without the negligent operation of the motor vehicle.

The *Partridge* Court reaffirmed its reasoning in *Sabella v. Wisler* (1963) 59 Cal.2d 21, rejecting the "but for" test in determining insurance coverage. In *Sabella*, 59 Cal.2d at p. 33, the Court had held that a loss "proximately caused" by a covered peril would still be covered even though an excluded peril was a "but for" cause of the loss. The *Partridge* Court approved that reasoning:

> . . . [T]he *Sabella* Court rejected the insurer's contention that coverage was unavailable whenever an excluded risk constituted a "but for" cause of an accident. The *Sabella* Court declared: "[I]f [California Insurance Code] Section 532 were construed in the manner contended for by defendant insurer, where an excepted peril operated to any extent in the chain of causation so that the resulting harm would not have occurred "but for" the excepted peril's operation, the insurer would be exempt even though an insured peril was the proximate cause of the loss. Such a result would be directly contrary to the provision in

> [California Insurance Code] Section 530 . . . for liability of the insurer where the peril insured against proximately resulted in the loss. (*Partridge*, supra, 10 Cal.3d at p. 105 fn. 11.)

California Insurance Code Sections 530 and 532 are still effective today.

In the instant case, the Ninth Circuit contravened the crucial feature of the entire *Partridge* analysis by adopting the very argument which the California Supreme Court expressly rejected in *Partridge*. Erroneously embracing the "but for" test, the Ninth Circuit concluded that in this case, "Richardson's injuries could not have happened unless he had been engaged in maintaining the van or was negligently supervised in doing so." (Appendix - Ninth Circuit Memorandum Opinion Reversing District Court Judgment, p. 99a.) The Ninth Circuit then disposed of this case on that ground. The Ninth Circuit thus "overruled" *Partridge* by confusing the fortuitous sequence of events which caused a particular accident to occur with the *Partridge* principle that an independent act of negligence generates independent liability (coverage) regardless of how that act concurred with another (excluded) act to cause the particular injury.

In *Partridge*, the gun with the hair trigger could not have injured the victim unless there had been negligent driving under the sequence of events which actually caused injury. Thus, the proper test is not whether the vehicle related negligence did in fact cause injury in the specific case, but whether an injury could have occurred without the fortuitous involvement of the vehicle. The Ninth Circuit, no doubt, would have applied the same erroneous reasoning adopted herein to conclude, "[Partridge's] injuries could not have happened unless he had been engaged in [riding in the vehicle] or was negligently supervised in doing so." The Ninth Circuit, no doubt, would have denied coverage in *Partridge* itself, based on the misanalysis adopted in the instant case.

What the Ninth Circuit has overlooked about *Partridge*, however, is that the fortuity of how a particular sequence of events caused the particular injury is not significant. The mere fact that Richardson's particular injury (from a vehicle catching fire) involved a motor vehicle does not end the analysis. *Partridge's* particular injury could not have happened without a vehicle either. The test, as the California Supreme Court laboriously explained in *Partridge*, is not whether the particular injury "could have happened without the vehicle", but rather whether there was an independent act of negligence which could have

caused some injury in some fashion without vehicle involvement.

In *Partridge*, the negligent filing of the trigger made the gun more dangerous, so that it could have gone off in any number of factual scenarios. For that reason, the California Supreme Court (unlike the Ninth Circuit) looked beyond the tautological and trivial observation that the particular accident could not have happened without a vehicle. If the driver had not driven negligently and hit a bump, the gun would not have discharged and the *Partridge* victim would not have been injured. The California Supreme Court still found coverage, because there were scenarios in which injury might have occurred (although it actually did not) without vehicle involvement. The California Supreme Court provided hypothetical examples of how the shooting victim could have been injured without involvement of the motor vehicle.

> A hypothetical may serve to explain further our conclusion in this regard. If, after negligently modifying the gun, Partridge had lent it to a friend who had then driven his own insured car negligently, resulting in the firing of the gun and injuring of a passenger, both Partridge and his friend under traditional joint tort-feasor principles would be liable for the injury. In such

> circumstances, Partridge's personal liability would surely be covered by his homeowner's policy, and his friend's liability would be covered by automobile insurance. When viewed in this perspective, it can be seen that State Farm is presently attempting to escape liability under the homeowner's policy simply because, in the instant case, both negligent acts happened to have been committed by a single tort-feasor. In our view, this coincidence cannot defeat the insurer's obligation to indemnify the insured for liability arising from non-automobile risks. (*State Farm Mutual Automobile Ins. Co. v. Partridge* (1973) 10 Cal.3d 94, 103.)

The *Partridge* Court also noted:

> If the gun had accidently fired while the insured was walking down the street or running through the woods, the insurer admits that any resultant damage would clearly be covered by the policy. (Ibid.)

The Ninth Circuit is bound by the California Supreme Court's *Partridge* decision and therefore must follow the *Partridge* test, not the "but for" test expressly rejected in *Partridge*. In the instant case, the independent act of negligence was feeding alcohol to a known alcohol-

dependent minor child. That act was not vehicle related any more than filing a trigger was vehicle related. The minor (intoxicated) could have done any number of unwise things, from repairing a gas powered lawn mower, to flying an airplane, to smoking by a gas pump at a service station. The fortuity that the minor, having been rendered dangerous and incapacitated by the negligence of the insured, happened to select a vehicle as the instrument of his destruction does not (under *Partridge*) provide State Farm with windfall relief from its insured's negligence.

To clarify its rationale, *Partridge* divided the two acts of negligence among two individuals. The same can be accomplished here. To illustrate, assume that the minor was four years old instead of 16. The insured, Ms. Meaders, feeds alcohol to herself and the minor on the front lawn, then falls asleep. The child then crosses the street to a neighbors home and the neighbor negligently permits the now intoxicated child to enter his vehicle which was parked on a sloped driveway. The child is injured after disengaging the parking brake and rolling into the street. Is State Farm relieved from its duty to defend? No - as illustrated in *Partridge*, both Ms. Meaders and the neighbor are joint tort-feasors. Ms. Meaders is covered under her homeowner's policy (regardless of the fortuitous involvement of a motor vehicle) and the

neighbor is covered under his auto policy. Now assume that the four-year-old is given matches to play with by the insured, after both she and the four-year-old are intoxicated. The insured falls asleep in the house, leaving the door open. The four-year-old wanders out to the car which has a gas leak. Playing with matches, the four-year-old sets the car on fire and it explodes, causing injury. Is State Farm relieved from its duty to defend? Under the reasoning of the Ninth Circuit (but not the *Partridge* Court), the answer, incredibly, is yes. Yes - because of the "coincidence" that "both negligent acts happened to have been committed by a single tort-feasor." (Compare *Partridge*, supra, 10 Cal.3d at p. 103.)

Because the issue is a subtle one which will recur in the Federal Courts (given insurance companies' propensity to remove coverage actions to Federal Court), this Court should grant certiorari. The question is one of exceptional importance to the public, bench and bar. It not only affects many cases, with much at stake, but addresses a paramount issue in all diversity cases: whether the Federal Courts are at liberty to overrule (in the guise of "interpretation") binding State Supreme Court authority.

The Ninth Circuit herein also patently misread *Hartford Fire Ins. Co. v. Superior Court* (1983) 142 Cal.App.3d 406. In *Hartford*, an adult pilot himself

consumed alcohol before flying an airplane. The airplane crashed and the estate of the passengers sued the estate of the pilot, alleging that the pilot had consumed alcohol prior to flying the airplane. The defending insurance carrier argued that there was no coverage, premised upon an airplane exclusion. As the Ninth Circuit noted in the present case, at page six of its decision, "the Court [in Hartford] reasoned that consumption of alcohol alone was not negligent; only the act of piloting a plane while intoxicated could have given rise to the accident. Thus, any damage caused while operating the aircraft under the influence of alcohol was wholly dependent on the operation of the airplane and *Partridge* did not apply." (Emphasis added.) (Appendix - Ninth Circuit Memorandum Opinion Reversing District Court Judgment, p. 105a.)

The Ninth Circuit's own statement belies its erroneous conclusion that Hartford "controls" the present case. In *Hartford*, the exclusion applied so as to bar coverage because the act of consuming alcohol by an adult is not negligent conduct. Therefore, there could be no liability (and hence no coverage) without use of the airplane for an obvious reason: the only "act of negligence" was the drunken adult pilot's flying of the airplane. The adult's consumption of alcohol was not, as a matter of law, an "act of negligence."

The Ninth Circuit completely overlooked that most crucial aspect of *Hartford*, which is not present in the instant case. Here, unlike in *Hartford*, the insured's feeding alcohol to a child was an act of negligence in and of itself, regardless of what the child later did while intoxicated. The insured in the instant case did not consume alcohol herself, then drive her car to hit Richardson while intoxicated. Under that scenario, *Hartford* might apply. Where the "independent act of negligence", however, is not the consumption of alcohol by the adult insured, but rather the feeding of alcohol to a child by the insured, *Hartford* plainly has no application.

Under *Partridge*, the court first determines whether the alleged independent act of the insured is, in and of itself, negligence. If that conduct is negligence and is a proximate cause of the accident, the exclusion will not operate to avoid coverage. In *Hartford*, there was admittedly no separate independent act of negligence by the insured. There was such an independent act in the present case - the insured's furnishing of alcohol to a 16-year-old boy whom she knew to have an alcohol problem. Such conduct was blatant negligence.

The Ninth Circuit's statement that, "Richardson's injuries could not have happened unless he had been engaged in maintaining the van or was negligently

supervised in doing so" contravenes *Partridge's* admonition not to use the "but for" test in these types of cases. (Emphasis added.) If the California Supreme Court had used the "but for" test in the *Partridge* case, the Court in *Partridge* itself would not have found coverage therein. Using the "but for" test would have made it very simple for the *Partridge* Court to say, "but for the use of the automobile there would have been no accident".

The Ninth Circuit's erroneous embrace of *Hartford* also contravenes its duty to follow the California Supreme Court's rejection of the "but for" test in *Partridge*. Contrary to the Ninth Circuit's assumption, it is *Partridge*, not *Hartford*, which is controlling. *Hartford* has value only to the extent that it correctly interprets *Partridge*. The *Hartford* court, however, misread *Partridge* itself in erroneously promoting the "but for" test which *Partridge* had rejected:

> In sum, in the case at bench, the accident could not have happened but for the operation and use of the aircraft by Thomas Tobin. (*Hartford, supra*, 142 Cal.App.3d at p. 415; emphasis in original.)

Hartford may have been correctly decided because the consumption of alcohol alone by an adult is not negligence. However, the *Hartford* Court's use of the "but for" analysis was contrary to *Partridge*. *Partridge* endorsed

a prior California Supreme Court holding in *Sabella v. Wisler* (1963) 59 Cal.2d 21, 33, which "rejected the insurer's contention that coverage was unavailable whenever an excluded risk constituted a 'but for' cause of an accident." (*Partridge, supra*, 10 Cal.3d at p. 105, fn. 11.) The dissent in *Partridge* objected to the majority's rejection of the "but for" test. (Id. at p. 108.) Thus, the *Hartford* court's promotion of the "but for" test contravenes *Partridge*, and it is *Partridge*, not *Hartford*, which is binding on the Ninth Circuit. By overlooking and "overruling" *Partridge*, the Ninth Circuit has exceeded the bounds of its constitutional and statutory authority, which mandates that California substantive law, as declared by the California Supreme Court, be applied by the Ninth Circuit.

The Ninth Circuit similarly misapplied the clearly inapplicable case of *State Farm Fire and Casualty Co. v. Camara* (1976) 63 Cal.App.3d 48, 54-55. That case held that the negligent design of a dune buggy could not cause injury independent of the use of the dune buggy. It is obvious, however, that the negligent design of a vehicle can only cause injury when the vehicle is "used." The negligent impairment of a minor with alcohol, on the other hand, can cause injury to the minor in any number of factual scenarios.

State Farm can gain no comfort from the argument that providing alcohol was "negligent supervision." In order to be applicable, the exclusion for "negligent supervision" expressly requires that the negligent supervision be, "with regard to ownership, maintenance or use of any . . . motor vehicle." (Emphasis added.) (Appendix - Excerpts of State Farms Homeowner's Insurance Policy, p. 109a-110a.) The insured was not even home when the accident occurred. The fact that petitioner fortuitously was "repairing" the insured's vehicle when injured does not, after the fact, transform all prior negligent acts or omissions into supervision "with regard to the motor vehicle".

CONCLUSION

For the reasons set forth herein, this petition for a writ of certiorari should be granted. The decision of the Ninth Circuit should be reversed, and the matter should be remanded to the Ninth Circuit under directions that such Court properly apply the *Partridge* decision in the manner set forth herein by petitioner, resulting in the determination that the negligent provision of alcohol to petitioner was a concurrent cause of his injury, independent of the use of a motor vehicle. For that reason, there was potential coverage and the decision of

the United States District Court, the Honorable Oliver W. Wanger, District Judge, should be reinstated. In the alternative, the Ninth Circuit should be directed to pursue further proceedings in accordance with the principles settled by this Court's determination that Ms. Meaders' negligent furnishing of alcohol to Mark Richardson constituted a concurrent cause of Mark's injury, independent of the use of a motor vehicle.

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APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARK RICHARDSON, Plaintiff, vs. STATE FARM FIRE AND CASUALTY COMPANY, Defendants.	Case No. CV-F-91 367 OWW **MEMORANDUM OPINION RE CROSS MOTIONS FOR SUMMARY JUDGMENT**

I

BACKGROUND

A. Summary of Case.

Plaintiff Mark Richardson, assignee of rights from insured Linda Meaders, filed this action on February 28, 1991 against defendant State Farm Fire and Casualty ("F&C") for bad faith failure to defend Meaders pursuant to her homeowners' insurance policy against potential liability for injuries sustained by Richardson at Meaders' home in April, 1988, and to enforce the resulting stipulated judgment under California Insurance Code §11580. Personal jurisdiction in this case is based on

diversity of citizenship of the parties and amount in controversy in excess of the jurisdictional minimum.

B. **Undisputed Facts.**

The following facts are undisputed.

In April of 1988, plaintiff Mark Richardson, then 16 years old, resided with his mother after the divorce of his parents. Due to problems at home, Linda Meaders ("Meaders" or "the insured") invited Richardson to stay with her at no cost. During Richardson's stay, Meaders' two teenage daughters and several other teenage boys and girls lived in the same house.

Richardson's mother intended that Mark stay with Meaders no more than six months before returning home. (Plf. Statement of Undisputed Facts at 3). While staying with Meaders, Richardson slept on the couch. During the four days he ultimately stayed with Meaders, Richardson's mother visited him twice and he visited his mother at her home. Id.

After staying with Meaders for four days, Richardson offered to repair an oil leak in Meaders' 1979 Volkswagen van. While Meaders considered the work dangerous, and hesitated in granting permission, she ultimately allowed Richardson to work on the car.

Richardson spent several days in Meaders' driveway removing the motor and fixing the leak.

Meaders regularly served alcohol to the teenagers living with her, including Richardson, though she knew he had problems with alcohol and drugs. (Stip. Exh. 5 at 22) On April 30, 1988, Richardson consumed two beers in the two hours before the accident.

On that day, after rebolting the engine to the chassis, but prior to reconnecting all wires, Richardson attempted to reconnect the gas line to the engine. While doing so, gasoline leaked onto his shirt. When Richardson attempted to push the gas line through a clamp, it slipped, dragging across the chassis, creating a spark that ignited his shirt. Richardson suffered severe third degree burns.

At the time of the accident, Meaders held two insurance policies: an automobile issued by State Farm Automobile Insurance Company (Stip. Exh. D24A-B) and a homeowner's policy issued by F&C. (the "Policy".) (Stip. Facts D23 A-B.)

On October 13, 1988, Richardson, through his guardian ad litem, Linda Richardson Ortiz, sued Meaders for negligence in Tulare County Superior Court Action No. 134724. After demand by Meaders, State Farm

Automobile Insurance Company undertook her defense and ultimately paid the limits of the Policy. State Farm Fire and Casualty Company however, refused to defend citing three separate coverage exclusions in the Policy.

> 1. An exclusion for coverage of bodily injury or property damage arising out of the "ownership, maintenance, use, loading or unloading of a motor vehicle owed or operated by or rented or loaned to any insured."
>
> 2. An exclusion for coverage under the policy for "bodily injury or property damage "arising out of the entrustment, negligent supervision, statutory liability or liability assumed through an unwritten or written agreement by any insured with regard to the ownership maintenance or use of any motor vehicle."
>
> 3. An exclusion for coverage under the policy for "bodily injury to any insured within the meaning of the

> definition section of the policy [and] the policy defines an insured to include any person under the age of twenty-one who is in the care
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> of the named insured and a resident of her household."

(Stip. Facts F27)

After extensive investigations and discovery, Richardson's attorney wrote to Meaders' attorney demanding payment of damages up to the policy limits of both the auto policy ($25,000) and the homeowners' policy ($300,000) plus medical pay coverage under each policy of, respectively, $25,000 and $1,000. In the alternative, plaintiff demanded $1 million, in exchange for which plaintiff would give Meaders a covenant not to execute against her personal assets and would take an assignment of all of Meaders' rights against defendant F&C.

Richardson's demand letter to Meaders enclosed medical bills totalling $143,000, a medical report indicating future surgeries costing $100,000 and a legal memorandum responding to issues raised by the F&C in its letter denying coverage. Both insurers received copies of Richardson's demand packet. On November 9, 1988, Defendant F&C again refused to defend and refused to join in settlement negotiations (Stip. Facts F27); despite express invitation from plaintiff to do so.

Meaders obtained counsel to represent her personal interests and on October 22, 1990, she and Richardson executed the assignment of action and covenant not to execute. (Stip. Facts C22.) On December 11, 1990, the Honorable John Moran, Judge, Tulare County Superior Court, entered the $1 million stipulated judgment. (Stip. Facts B21)

Richardson then sought a state court order to execute the stipulated judgment against defendant F&C under Insurance Code §11580 and the assignment of rights. Defendant removed this case on the basis of diversity jurisdiction. Both parties have filed motions for summary judgment.

Richardson seeks to establish that as a matter of law, F&C had a duty to defend Meaders because there was potential coverage of the alleged liability under Meaders' homeowner's policy at the time F&C refused to defend and as a result of its bad faith refusal to defend, F&C is liable for the full amount of the stipulated judgment. More specifically, plaintiffs argue 1) the insured's negligent serving of alcohol to a drug/alcohol dependent minor constitutes an independent concurrent cause of the accident which requires coverage despite the presence of another, excluded, proximate cause i.e., the motor vehicle; and 2) Richardson was not a resident of the Meaders' household and therefore not subject to the bodily injury exclusion for insureds. In the alternative, Richardson contends 3) a van without a fully operable engine is either not a motor vehicle or is in dead storage so the motor vehicle exclusion does not apply or; 4) Richardson was a residence employee and thereby

excepted from the motor vehicle exclusion.

F&C seeks summary judgment on the grounds that the facts of the case gave rise to no duty to defend because 1) the van was a motor vehicle, not in dead storage and 2) the negligent serving of alcohol was inextricably linked to the motor vehicle so the motor vehicle exclusion eliminated all potential liability. In the alternative, F&C argues 3) Richardson was an insured, and thus, not covered by the policy, because he was a resident of the Meaders' household; 4) because Meaders was providing child care services, Richardson's injuries were excluded under the child care services exclusion of the policy; 5) State Farm Automobile's defense eliminated defendant's duty to defend; 6) because Richardson was eligible to receive workers compensation, coverage under the policy was precluded; and, 7) the executed judgment is the product of collusion between the plaintiff and the insured, and is therefore void.

Richardson contends that F&C may rely only upon the defenses asserted in its denial letter and therefore may not deny potential liability either on the child care services exclusion; the fact of State Farm Automobile's defense; or the workers compensation exclusion.

III

DISCUSSION

Where a federal court has jurisdiction by virtue of diversity of citizenship of the parties, the court must look

to the substantive law of the forum state, here, California. Erie R.R. Co. v. Tompkins, 304 U.S. 69, 78, 58 S.Ct. 817 (1938).

A. An Insurer Has A Duty To Defend Against Potential Liability Covered By An Insurance Policy.

The California Supreme Court has expressed "the fundamental principle that an insurer cannot escape its basic duty to insure by means of an exclusionary clause that is unclear." State Farm Mut. Auto Ins. Co. v Jacober, 10 Cal.3d 193, 201, 110 Cal.Rptr. 1 (1973) In the present case, "to excuse the duty to defend, the pleading of the underlying action must unambiguously exclude coverage under the policy." Marglen Industries v. Aetna Ca. & Sur., 5 Cal.Rptr. 2d 659 (Cal.App. 4 Dist. 1992) (citing 7C Appleman Insurance Law and Practice (rev. ed. 1979) §4684.01, pp. 124-26; State Farm Mut. Auto Ins. Co. v. Cummings, 21 Cal.App.3d 441, 98 Cal.Rptr. 320 (1971)). The burden is on the insurer to prove that a claim is within an exclusion. Clemmer v. Hartford Ins. Co., 22 Cal.3d 865, 151 Cal.Rptr. 285 (1979).

An insurer's duty to defend is separate from and broader than its duty to indemnify. Ohio Casualty Ins. Co. v. Hubbard, 162 Cal.App.3d 939, 944 (1984), 208 Cal.Rptr. 806, 809; Eichler Homes Inc. v. Underwriters at Lloyd's of London, 238 Cal.App.2d 532, 539, 47 Cal.Rptr. 843, 847 (1965). "An insurer's duty to defend must be analyzed and determined on the basis of any potential liability arising from facts available to the insurer from the complaint or other sources available to it at the time of

the tender of the defense." CNA Casualty of California v. Seaboard Surety Co., 176 Cal.App.3d 598, 605, 222 Cal.Rptr. 276, 277 (1986) (citing Gray v. Zurich Insurance Co., 65 Cal.2d 263, 275-277, 54 Cal.rptr. 104 (1966)). "So long as the complaint contains language creating the potential of liability under an insurance policy, the insurer must defend an action against its insured even though it

has independent knowledge of facts not in the pleadings that the claim is not covered." Id. at 606, 278-279.

In making the determination of potential liability, a carrier is charged with notice of all facts which might be ascertained had it diligently pursued investigation. California Shoppers, Inc. v. Royal Globe Ins. Co., 175 Cal.App.3d 1, 221 Cal.Rptr. 171 (1985) "Where there is doubt as to whether the duty to defend exists, the doubt should be resolved in favor of the insured and against the insurer." Eichler Homes, Inc., at 539, 847; CNA Casualty, at 607, 279 (fn.1)

F&C agrees that Richardson's claim falls within the general coverage provided by Section II, subsection L, of the policy, which requires F&C to provide a defense at F&C's expense if an insured is sued for damages for bodily injury covered by the policy. F&C argues, however, that the motor vehicle exclusion of the policy prevents coverage of Richardson's injuries because the accident arose out of the maintenance of a motor vehicle.

The motor vehicle exclusion denies coverage for

(e) bodily injury or property damage

> arising out of the ownership, maintenance, use, loading or unloading of (2) a motor vehicle owned or operated by rented or loaned to any insured.
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> This exclusion does not apply to bodily injury to a residence employee arising out of and in the course of the residence employee's employment by an insured.

Stip. Exh. D23a, p. 14

The policy defines a motor vehicle as

> a motorized land vehicle designed for travel on public roads or subject to motor vehicle registration. A motorized land vehicle in
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> dead storage on an insured location is not a motor vehicle.

Stip. Exh. D23(a), p. 1

B. **Independent, Concurrent Causation**

Since 1973 California courts have struggled to apply the doctrine of "independent concurrent causation" which emerged from the California Supreme Court's seminal decision in State Farm Mutual Automobile Ins. Co. v.

Partridge, 10 Cal.3d 94, 109 Cal.Rptr. 811 (1973). Specifically, that court held that "a liability insurance policy provides coverage for an accident caused jointly by an insured risk . . . and by an excluded risk . . . ." Partridge, supra, at 102.

In Partridge, the insured negligently filed his gun to create a hair trigger. While driving off-road in pursuit of jackrabbits with the gun in hand, Partridge's truck hit a bump, and the gun discharged injuring a passenger. The insured sought coverage of injuries to the passenger under his homeowner's and automobile policies. The California Supreme Court found coverage under the auto policy, which covered accidents arising from the use of an automobile and under the homeowner's policy which excluded coverage of accidents arising from the use of the automobile because "the accident was caused jointly by an insured risk (the negligent filing of the trigger mechanism) and by an excluded risk (the negligent driving)." In other words, because the negligent filing of trigger mechanism was conduct independent of the use of the automobile, the exclusion in the homeowner's policy of coverage for injuries arising from the use of an automobile did not apply.[1]

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[1] The California Supreme Court specifically found no contradiction in holding that the accident arose from the use of an automobile to grant coverage under the auto policy but denying that the accident arose from the use of an automobile within the meaning of the homeowner's policy exclusion for such accidents. The court reached this conclusion because "coverage clauses are interpreted

The Partridge court explained that if Partridge had negligently modified the gun and then lent it to a friend who had then injured his passenger while driving, "both Partridge and his friend under traditionally joint tortfeasor principles would be liable for the injury," and there would be no question of coverage under the insured's homeowner's policy. Id. at 103. The court saw no reason to allow the insurer to avoid otherwise expected coverage simply because a single tortfeasor committed both negligent acts. Likewise, the insurer could not avoid coverage if the negligent trigger filing resulted in accidental injury while the gun owner was walking down the street or running through the woods. Id.

The Partridge court "rejected the insurer's contention that coverage was unavailable whenever an excluded risk constitutes a 'but for' cause of an accident." Id., at 105-106 [109 Cal.Rptr. 811, 818], (fn. 11). While it was true that the accident would not have occurred but for the jostling of the automobile, the Partridge court concluded that "coverage under a liability policy is equally available to an insured whenever an insured risk constitutes simply a concurrent proximate cause of the injuries." Id. (Emphasis original); Accord, Garvey v. State

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broadly so as to afford the greatest possible protection to the insured (citations omitted), exclusionary clauses are interpreted narrowly against the insurer." (citations omitted) Partridge at 101-102. In the present case, the fact that Meaders' automobile policy has already provided coverage does not mean the automobile exclusion of the homeowners' policy bars coverage in this suit.

Farm Fire and Casualty Co., 48 Cal.3d 395, 257 Cal.Rptr. 292 (1989) (Insurance Code §§530[2] and 532[3] provide coverage even though an excluded danger was a "but for" cause of the accident if a covered risk was also a proximate cause of the accident).

Richardson argues that as in Partridge, two causes came together in this action to form injury: the negligent serving of alcohol and negligent supervision of automobile maintenance. Under Partridge, while the Meaders automobile might have been a "but for" cause of the accident, because the negligent serving of alcohol was an independent, concurrent cause of the accident, Meaders' homeowner's insurance policy covers Richardson's injuries.

Richardson explains that the negligent serving of alcohol was independent of the vehicle because it could have caused harm in other situations. For example, if Richardson had been injured while working on the lawn

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[2] California Insurance Code §530 provides: "An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause."

[3] California Insurance Code §532 provides: "If a peril is specifically expected in a contract of insurance and there is a loss which would not have occurred but for such peril, such loss is thereby excepted even though the immediate cause of the loss was a peril which was not expected."

mower after Meaders served him alcohol then the homeowners policy would provide coverage. Defendants, however, counter that the type of injury defines whether the covered negligence is inseparable from the excluded instrumentality, that is, the injury suffered by Richardson could have been caused only by the ignition of the automobile, the non-covered instrumentality. In other words, but for the use of the automobile, Richardson's injuries, specifically, severe burns, would not have occurred.

Plaintiff's original complaint against Ms. Meaders alleges that the negligent serving of alcohol was a proximate cause[4] of Richardson's injuries. (SF Exh. B1) Meaders stipulated to liability and F&C did not object though it could have reserved the right to dispute coverage. (SF B20) Plaintiff's motion for summary judgment reiterates the allegations of the original complaint. (Plf. Motion at 22) Defendant opposed plaintiff's motion because the negligent serving of alcohol was allegedly dependent on the motor vehicle but disputed neither the allegations of negligence nor the allegations of

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[4] In Mitchell v. Gonzales, 54 Cal.3d 1041 (1991) the California Supreme Court recently held that due to injury confusion, the "legal cause" instruction must be given instead of the "proximate cause" instruction. The decision emphasizes the substantial overlap between the two standards. Id. at 1052-53. For the sake of consistency with Partridge language, reference is to proximate cause.

proximate causation.[5]

Defendant's cross motion for summary judgment similarly attacks the application of Partridge only on the issue of motor vehicle dependence.[6] Only in the final sentences of its reply argument that largely focuses on the independence issues does defendant erroneously state "nowhere does plaintiff suggest or even hint that serving alcohol was a proximate cause, without which plaintiff would not have been injured." (Def. Reply at 20:15-18).

The parties have agreed that no factual matters remain in dispute and specifically agreed that the application of independent, concurrent causation doctrine to this case is a matter of law. (Transcript at 12:9-16). Defendant did not dispute plaintiff's proximate cause claim when given the opportunity and offered no evidence on the issue of what effect the furnishing of alcohol had

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[5] "Well established case law mandates the claimed concurrent cause must be a proximate cause of the injury and independent of the use or maintenance of the vehicle in order to find coverage. Since it is clear that plaintiff would not have been injured but for the maintenance of the van, plaintiff's effort to find coverage must fail." (Opp. at 26:1-6).

[6] "Ms. Meaders allegedly failed to supervise plaintiff, failed to provide him with the proper tools and furnished him with alcoholic beverages. Irrespective of these allegations, if plaintiff had not been using or maintaining the van plaintiff would not have received his injuries." (Def. Motion at 24:12-16)

on plaintiff. Defendant neglects to mention that plaintiff need only show potential, not actual, causation. CNA Casualty, supra at 605. Finally, defendant must overcome the resolution of all doubts in favor of imposing the duty to defend. Eichler Homes, Inc., supra at 539; CNA Casualty, supra at 607, 279 (fn.1)

Defendant admits that Ms. Meaders negligently served alcohol to a minor who suffered from problems with drugs and alcohol immediately prior to allowing him to do extensive work on her automobile. The negligent serving of alcohol was a potential proximate cause of Richardson's injuries. Under the relevant cases, the issue that must be decided is whether the negligent serving of alcohol is independent of the use of the motor vehicle.

C. **The Negligent Serving of Alcohol Was An Independent Concurrent Cause For Purposes Of Determining F&C's Duty To Defendant Meaders.**

1. Partridge's Progeny.

For the intervening twenty years since the Partridge decision, California Appellate Courts have sought to apply the Partridge rule to cases of third party liability.[7]

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[7] If the insured seeks coverage against loss or damage sustained by the insured, the claim concerns first-party property loss. If, however, the insured seeks coverage against liability of the insured to another, the claim concerns third party liability. Garvey v. State Farm Fire

Complexities in the definition of "independent, concurrent cause," have emerged that defy straightforward application. In this diversity case, this court sits as another court of the state and is bound to apply California law. Eire, supra.

Close scrutiny of the post-Partridge cases reveals a distinct pattern which tracks the original "independent concurrent causation" doctrine articulated by the California Supreme Court. The rule which has emerged requires determination whether the covered negligent conduct or instrumentality is inextricably bound up with the excluded negligent conduct or instrumentality.

On the one hand there are cases which have found no coverage under the insured's policy because the alleged independent concurrent cause was not negligent without some use of the excluded instrumentality. In other words, the use of the excluded instrumentality created the risk which otherwise would never have existed.

For example, in State Farm Fire and Casualty Co. v. Salas, 222 Cal.App.3d 268, 271 Cal.Rptr. 642 (1990) the insured attempted to maintain his tire pressure by injecting flammable sealant into the tire and then

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and Casualty Co., 48 Cal.3d 395, 399 n.2, 257 Cal.Rptr. 292, 293 n.2 (1989). Garvey limited the application of Partridge to third party liability situations but expressly declined to elaborate on Partridge in the liability context. Id. at 409 n. 8. The parties agree that this case concerns third-party liability and Partridge governs.

negligently failed to warn a repairman before he began welding a crack in the rim. After the tire exploded and injured the repairman, the insured argued that the failure to warn constituted an independent concurrent cause of the accident sufficient to trigger coverage by his homeowner's policy. The court found no independent non-auto related act because "the insured's failure to warn was inextricably bound up with his attempts to maintain his automobile's tire pressure." Id. at 276. ("the 'excluded instrumentality' . . . i.e., the insured's motor vehicle, was

not the mere passive situs of negligence divorced from the vehicle's maintenance."

Similarly, in State Farm Fire & Cas. Co. v. Camara, the court concluded that the negligent design of a dune buggy was not an independent cause within the meaning of Partridge. The court held that "the only way in which plaintiff could have been exposed to the claimed design risk was through the operation or use of the motor vehicle." Id. at 55.

In Allstate Ins. Co. v. Jones, 139 Cal.App.3d 271, 188 Cal.Rptr. 557 (1983), defendant improperly secured and inspected a rack for transporting steel reinforcing rods. After the insured negligently collided with another car, the rack flew off and killed the car's driver. The court held that the homeowner's policy did not cover the accident because the negligent securing and inspecting of the rack was dependent upon the use of the automobile. The court concluded that the insured's "failure to inspect, etc. would not have been negligent were it not for his use of the truck . . . the improperly loaded rebar depended on

the truck's movement and velocity to become a hazard." Id. at 277; see also, Safeco Ins. Co. v. Gilstrap, 141 Cal.App.3d 524, 190 Cal.Rptr. 425 (1983) (negligent entrustment of motor vehicle was not a negligent act independent of the motor vehicle within the meaning of Partridge); National Indemnity Co. v. Farmers Home Mutual Ins. Co., 95 Cal.App.3d 102, 157 Cal.Rptr. 98 (negligent failure to supervise and control a child during unloading of a vehicle was not a negligent act independent from the excluded vehicle).

In each of these cases, the use of the excluded instrumentality created the risk. The failure to warn in Salas was a failure to warn about past attempts at maintaining the vehicle. Salas, supra at 276. The design risk in Camara and the improper loading of the rack in Jones could only manifest themselves through use of the car. Camara, supra at 55; Jones, supra at 277. The entrustment in Gilstrap becomes negligent only upon the negligent use of the thing entrusted. Gilstrap, supra at 532. And the negligent unloading of a child in National Indemnity required the unloading from the vehicle. National Indemnity, supra at 108.

Juxtaposed are the line of cases which hold that while the alleged risk created by independent concurrent negligent conduct might manifest itself fortuitously through the use of the excluded instrumentality, because the same risk could manifest itself in ways independent of the excluded instrumentality, the resulting injuries are covered by the insured's homeowner's policy.

The Partridge case, of course, is the leading

example of an alleged risk by the concurrent negligent conduct (filing of the trigger mechanism) which is independent of the use of the excluded instrumentality (the automobile) because the risk just as easily could have been manifested through, for instance, the negligent handling of the gun by a third party. Other cases where the courts found the concurrent negligent conduct independent of the use of the excluded instrumentality include State Farm Fire and Casualty Co. v. Kohl, 131 Cal.App.3d 1031, 182 Cal.Rptr. 720 (1982) (An insured caused an automobile accident, then caused further injury by dragging the injured party off the road. The court found the dragging a non-vehicular act resulting in coverage under the homeowner's policy); Glen Falls Ins. co. v. Rich, 49 Cal.App.3d 390, 122 Cal.Rptr. 696 (The negligent placement of a loaded shotgun underneath the vehicle seat was held to be the creation of a risk independent of the vehicle even though the gun went off while in the vehicle.); Ohio Casualty Ins. Co. v. Hartford Accident & Indemnity Co. 148 Cal.App.3d 641 (1983) (A student was injured by another motorboat after diving off an insured's boat. The court refused to apply the watercraft exclusion because the negligent supervision of the insured constituted an independent proximate cause of the accident. The Ohio Casualty court concluded that "the insured's liability for his acts would be unaffected whether the acts occurred on boat, a pier, or on the shore. That they occurred on the boat is fortuitous.").

Relying on Sabella v. Wisler, 59 Cal.2d 21, 27 Cal.Rptr. 689 (1963), Defendant F&C urges that the Partridge doctrine is limited to only those cases, like Partridge, Glen Falls, Kohl, and Ohio Casualty, in which

the non-excluded instrumentalities were the immediate causes of injuries, while the excluded negligent conduct were remote causes. Specifically, F&C argues that the negligent serving of alcohol was a remote cause, while the automobile was the direct cause, of Richardson's severe burns. This is precisely the issue that F&C has elected to waive, to the extent it is factual, by not reserving its rights to contest whether the alcohol consumption was an operative or efficient cause of the accident.

In Sabella, leakage from a sewer pipe, a covered risk, caused "settling," an excluded risk, which in turn caused damage. The Sabella court found coverage by looking to the "efficient cause--the one that sets the others in motion--as the cause to which the loss is attributed, though the other causes may follow it, and operate more immediately in producing the disaster." Sabella, supra at 31-32.

The California Supreme Court, however, distinguished and rejected the application of Sabella to Partridge type cases:

> In the instant case, however, the "efficient cause" language of Sabella was not very helpful, for here both causes were independent of each other: the filing of the trigger did not 'cause' the careless driving, nor vice versa. Both, however, cause the injury. In traditionally tort jargon, both are concurrent proximate causes of the accident, the negligent driving constituting

> an intervening, but non-superseding cause of the accident.

Partridge at 104. Accordingly, when two independent acts come together to cause injury, as opposed to when one act causes another which then causes injury, the Partridge analysis and not the Sabella analysis applies.

The California Appellate Court's decision in Underwriters Insurance Company v. Purdie, 145 Cal.App.3d 57, 193 Cal.Rptr. 248 (1983) clarifies that Partridge is not limited to only those cases where the covered instrumentality directly caused the injury. In Underwriters, an insured's employee shot a deliveryman but the insured's policy excluded damages caused by firearms. The court held that the insured's negligent hiring and retention of an employee with a propensity for violence constituted an independent, concurrent cause of the injuries. After reviewing, Partridge, Glen Falls, and Kohl, the court concluded that, as in the case before it, "one of the negligent acts which occurred did not depend upon the use of the excluded risk, e.g., an automobile, and therefore, did not fall within the exclusionary clause." Id. at 69. In distinguishing Camara, National Indemnity, Jones, and Gilstrap, the court found that in each of those cases the alleged independent negligence was "solely and indivisibly related to the use of the excluded instrumentality."[8]

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[8] Atlas Assurance Co. v. McCombs Corp., 146 Cal.App.3d 135, 194 Cal.Rptr. 66 (1983) held that negligent hiring of a thief is not independent from the

2. Application of Partridge To The Present Case.

While defendant F&C agrees that the negligent serving of alcohol was a proximate cause of Richardson's injuries, it contends that because "[c]onsuming alcohol is not, along, negligent;" (Hartford Fire Ins. Co. v. Superior Court, 142 Cal.App.3d 406, 415, 191 Cal.Rptr. 37, (1983)), the negligent serving of alcohol cannot be an independent concurrent cause such as to trigger coverage of Richardson's injuries under Meaders' homeowner's insurance policy. Hartford, however, is inapposite here.

In Hartford, plaintiffs unsuccessfully attempted to avoid an aircraft exclusion by alleging three separate

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excluded risk of theft. Relying on Camara and Gilstrap, the court correctly noted that "No liability can arise from the claimed risk in negligently hiring a thief unless the thief actually steals something. It is the basing of liability specifically on the negligent act dependent upon the excluded theft as concurrent cause of the loss." (emphasis original) The Underwriters plaintiff, however, based liability on negligent hiring of a person with violent tendencies. Those general tendencies could have manifested themselves in a number of non-excluded ways but they happened to manifest themselves through the use of an excluded instrumentality, i.e., a firearm. Similarly, the serving of alcohol happened to manifest itself through the excluded automobile. As in Partridge and Ohio Casualty, such a fortuity cannot allow the insurer to escape liability for an otherwise covered risk.

negligence theories. The first and second theories concerned pre-flight planning and misrepresentation of flight abilities which the court held could only cause injury through use of the aircraft. The third theory concerned the pilot's intoxication. The court struck the third theory because the pilot's consumption of alcohol was not negligent without any connection with the aircraft so it did not constitute an independent cause. Hartford, supra at 415.

Here, as Richardson correctly notes, Meaders' furnishing of alcohol to a 16 year old boy, who she knew had alcohol and drug abuse problems, was negligent in and of itself because the act created a risk not dependent on the maintenance of the automobile. The risk that plaintiff's judgment would be impaired, that he would lose manual dexterity, and that he would act imprudently, did not arise from or relate to the automobile. No evidence has been proffered that alcohol was consumed in relation to the vehicle. Under Partridge, the fact that the risk fortuitously manifested itself in an auto-related accident does not relieve the insurer from liability.

The negligent serving of alcohol to a minor with drug and alcohol abuse problems in this case is similar to the negligent hiring and retention of an employee with the propensity toward violence in Underwriters. In both cases, the negligence was a proximate [legal] cause of the injuries. Alcohol consumption has an adverse effect on judgment and motor coordination. The fact that the injuries ultimately resulted from excluded instrumentalities does not alter the coverage because when two risks

"constitute concurrent proximate causes of an accident, the insurer is liable so long as one of the causes is covered by the policy." Partridge, supra, 10 Cal.3d at 102.

Here Meaders' negligent serving of alcohol to a minor with drug and alcohol abuse problems was potentially an independent concurrent cause of Richardson's injuries which triggered F&C's duty to defend. F&C chose to assume the known risk associated with the denial of coverage and its express and continued

refusals to participate in the settlement of the underlying case.

The Resident-Insured Exclusion Does Not Apply to Richardson

The policy excluded coverage for bodily injured to any insured. The policy defines insured as

> you and, if residents of your household:
>
> (a) Your relatives
> (b) Any other person under the age of 21 who is in the care of a person described above.

Plaintiff concedes that Richardson was under 21 at the time of the accident and arguably under the care of Ms. Meaders, but contends that he was not a "resident" of the household so he cannot be an insured. As the first sentence of the definition makes clear, Richardson cannot be an insured under the policy unless he was a resident of

Meaders' household. Given relevant statutes and the weight of California case law, Richardson was not a resident of the Meaders' household. He does not fall within the exclusion for resident-insureds.

Richardson only stayed with Meaders for four days before the accident. During those four days, his mother visited twice and Richardson returned to his mother's home for visits. In addition, his mother considered the stay only temporary.[9] Defendants initially argued that the mother had executed a Probation Supervision Agreement allowing Ms. Meaders to act as the local parent for school purposes. In fact, the document was merely an informal agreement between parent and child drawn up by a friend. Defendants cite no support for the proposition that such an agreement alone changes residence.

Defendant seeks to bind plaintiff by his unverified Third Amended Complaint which states that Richardson went to "reside" with Ms. Meaders. As plaintiff points out, defendant denied coverage without knowledge of the Third Amended Complaint so the document has no bearing upon the issues before the court. The context in which defendant seeks to interpret use of the term

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[9] While defendant originally alleged that Richardson's mother had signed a probation supervision agreement, it withdrew that contention upon learning that she and her son merely signed an informal agreement under the supervision of a Health and Human Services employee acting only as a friend of the family, not in any official capacity.

"reside" is a conclusion of law. A plaintiff is barred by well pleaded facts, not conclusions of law. B. Witkin, California Procedure, (3d ed.) Pleading §407 at 455 (citing Brown v. Aguilar, 202 Cal. 134, 139 (1927)) Plaintiff's use of the term "reside" is ambiguous. Defendant ignores that the complaint alleges "Linda Meaders welcomed and invited the minor plaintiff to temporarily reside with her and her minor children . . ." This qualification takes the use in the complaint of the term "reside" outside the legal definition. The words do not refute plaintiff's position. Although plaintiff uses the word "reside" without the qualification employed later in the complaint, there is no indication from the context of the complaint that plaintiff intended an admission to exclude coverage. The context of the use by plaintiff of the term "reside" is consistent with the intention to be in temporary occupancy at the Meaders' resident.

California Government Code Section 244 establishes that in determining the place of residence the following rules shall be observed:

> (a) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he or she returns in seasons of repose.
>
> (b) There can only be one residence.
>
> (c) A residence cannot be lost until another is gained.

(d) The residence of the parent with whom an unmarried minor child maintains his or her place of abode is the residence of such an unmarried minor child.

(e) The residence of an unmarried minor who has a parent living cannot be changed by his or her own act.

(f) The residence can be changed only by the union of act and intent.

(g) A married person shall have the right to retain his or her legal residence in the State of California notwithstanding the legal residence or domicile of his or her spouse.

Relying upon the statute alone, defendants cannot succeed in establishing that Richardson was a resident of Ms. Meaders' household within the meaning of the homeowners' policy. As an unmarried minor child, Richardson resided with his mother prior to his stay with Ms. Meaders. (§d) Richardson could not change this residence by his own act. (§e) Richardson's residence could only change when his mother both intended to and acted to bring about such a change. (§f) Defendants do not dispute that Richardson's mother intended only a temporary visit with Meaders.

While some California cases have relied upon this statute, (Safeco Ins. Co. v. Gibson, 211 Cal.App.3d 176, 259 Cal.Rptr. 206 (1989); Northwestern National Casualty Co. v. Davis, 90 Cal.App.3d 782, 153 Cal.Rptr. 556 (1979);

Allstate Ins. Co. v. Smith, 9 Cal.App.3d 898, 88 Cal.Rptr. 593 (1970)) others have relied upon common law principles in deciding the meaning of residence. In all of these cases the courts have consistently shown reluctance to shift a minor's residence away from his parents during a temporary visit. This reluctance is particularly strong when, as in this case, such a shift would bring the plaintiff within an insurance policy exclusion.

In State Farm Mut. Auto. Ins. Co. v. Elkins, 52 Cal.App.3d 534 (1975), an unmarried 19 year old rented an apartment four miles away from her parents home approximately two months before an accident. She kept a room with her parents, ate with them frequently, and spoke to one of her parents every day. Shortly before the accident, plaintiff's parents decided to move and the family decided that the daughter should move as well. The plaintiff had only taken the apartment as "an experiment designed to test her ability to be independent." Id. at 537. In deciding coverage existed under an automobile policy, the court held the daughter a resident of the parent's household.

In the present case, the 16 year old Richardson had only left his mother's home four days prior to the accident in an experiment designed to help assist him achieve social adjustment. Like the plaintiff in Elkins, Richardson visited home often. His parents did not consider the move permanent. Under Elkins, such a temporary stay does not shift a minor's residence away from the parent's home, particularly when retaining residence with the parents establishes coverage.

Similarly, in Smith, a minor lived away from his parent's home for three years while in the military but kept a bedroom at home and visited on furloughs and sick leave. The court noted that he was neither married, nor engaged to be married and "never established a separate household away from the base." Citing Government Code §244, the court concluded that Smith was still a resident of his parent's home, though he had spent the last three years living on various military bases throughout the world.

Before reaching this conclusion, the court distinguished two cases in which the California Supreme Court had held a plaintiff travelling with the military was not a resident of his parent's household. In both Island v. Fireman's Fund Indem. Co., (1947) 30 Cal.2d 541 and Shapiro v. Republic Idem. Co., (1959) 52 Cal.2d 437, the court relied upon "A cardinal rule of interpretation . . . that, where a provision of an insurance policy is susceptible of two constructions, it should be construed most strongly in favor of the policyholder." Island, 30 Cal.2d at 548 (citations omitted). Relying upon the rule, both cases rejected residence with the parent's because such an interpretation would have excluded plaintiffs from coverage. Noting the same policy in favor of the insured, the Smith court found that Smith was a resident because under the policy at issue such an interpretation provided coverage. See also, Cal-farms Ins. Co. v. Boisseranc, 151 Cal.App.2d 775 (minor living with mother held a resident of father's household because broad construction of terms provided coverage under father's policy); Hardware Mut. Cas. Co. v. Home Indem. Co., 241 Cal.App.2d 303, 50 Cal.Rptr. 508 (plaintiff who lived with policy owner several years earlier and for two weeks prior to accident held

resident for purposes of providing coverage); Reserve Insurance Co. v. Apps, 85 Cal.App.3d 228, 149 Cal.Rptr. 223 (1978) (Wife of insured still covered by husband's insurance policy though accident occurred during trial separation).

Some California courts have held the "cardinal rule of interpretation" inapplicable when considering "resident of household" because this phrase is not ambiguous. In Safeco Ins. Co. v. Gibson, (1989) 211 Cal.App.3d 176, 181, 259 Cal.Rptr. 206, the court reviewed the cases outlined above and concluded that

> the common thread that runs through each of these cases in not whether the terms 'residence' or 'member of household' are themselves inherently ambiguous, but whether, under the particular facts of each of those cases, insurance coverage was extended or excluded under the terms of the policy in question.

Similarly, in Vanguard Ins. Co. v. Hartford Ins. Co., 9 Cal.App.3d 76, 88 Cal.Rptr. 628 (1970), the court found no "uncertainties" in the phrase "residents of household" so there was no need to particularly favor the insured during interpretation. See also, Jacobs v. Fire Ins. Exchange, 227 Cal.App.3d 584, 278 Cal.Rptr.52 (1991) (Court did not address residence issue but held "household" not ambiguous, citing Safeco).

Even these cases, in which coverage was not found, do not factually support defendant's efforts to make

Richardson a resident of the Meaders' household for purposes of the homeowners policy. In Vanguard, the court held that a 13 year old who spent a four-day weekend with another family was not a "resident of household" for purposes of coverage. The court particularly noted that "general rule is that the residence of the father during his life . . . is the residence of the unmarried minor child." Id. at 768-69 (quoting 16 Cal.Jr.2d Rev., Domicile §9). Based upon this rule, which closely resembles Government Code §244, the court found that the child's residence had not changed during a short visit to another home.

Safeco is not authority to broadly construe the residence provision. In Safeco, divorced parents shared joint custody of their only child under a consent decree which placed the child with the father from Sunday evening until Wednesday morning and with the mother from Wednesday until Sunday evening. Safeco, supra at 178-79. The child was injured while staying with the father but the father's policy excluded coverage for "residents of the household." The court found this phrase unambiguous. Based upon an extended analysis of Civil Code sections concerning joint custody, the court concluded that the child had "dual residences." Because the child was staying with his father at the time of the accident, he resided with his father for purposes of the policy exclusion and was not covered.

Here, the residence analysis concerns residence with plaintiff's parent and residence with a family friend who welcomed plaintiff into her home while he attempted to overcome personal problems. Like the wife in Apps,

who was still a resident of her husband's household despite a trial separation, Richardson was still a resident of his mother's house. Like the daughter in Elkins, Richardson did not cease to reside with his parents during a brief move out of their house.

At the time of denial of coverage and defense, defendant's own attorneys questioned whether the resident insured exclusion could prevent liability under the homeowner's policy. Mr. James A. Baratta's letter to State Farm Fire and Casualty Company dated October 18, 1988, notes that the insured exclusion is clear and unambiguous "[h]owever, it is uncertain whether Mr. Richardson would qualify as an insured under the particular facts of this case." (Exh. 6 in Support of Plaintiff's Motion for Summary Judgment at 4).

It need not be decided whether the resident insured exclusion is ambiguous. Without invoking rules of interpretation favoring the insured, Government Code §244 and California cases compel the conclusion that Richardson remained a resident of his mother's home during his stay with Ms. Meaders. Richardson was an unemancipated minor who could not change his residence without parental consent, something he did not have. The cases reviewed establish that a temporary departure from a family home does not sever a minor's ties to that residence. Defendant's attorneys were unsure of whether Richardson qualified as a resident under the facts known prior to the refusal to defend. All of these reasons establish that the insurer cannot avoid liability for bad faith failure to defend based upon the resident insured exclusion.

F&C May Only Rely On Bases for Initial Denial

Plaintiff correctly observes that under California law an insurance company must conduct a reasonable investigation into all claims. Egan v. Mutual of Omaha, 24 Cal.3d 809, 818-819, 169 Cal.Rptr. 691, 695-696 (1979) cert. denied, 445 U.S. 912, 100 S.Ct. 1271 (1980). If the insurer finds no potential liability, it must state all reasons for a refusal to defend and all reasons not stated in the denial letter are waived. Hydro Systems, Inc. v. Continental Ins. Co., 929 F.2d 472, at 475-476 (9th Cir. 1991) (applying California law); Zumbrun v. United Services Auto. Ass'n, 719 F.Supp. 890 (E.D.Cal. 1989); McLaughlin v. Connecticut General Life Ins. Co., 565 F.Supp. 434, 451 (N.D.Cal. 1983); Becker v. State Farm Fire and Cas. Co., 664 F.Supp. 460, 461 (N.D.Cal. 1987).

A recent Ninth Circuit decision applying California law and a California Appellate Court decision note "where waiver has been found, there is generally some element of detrimental reliance by the insured." Garcia v. Calfarm Insurance Co., 92 D.A.R. 5851, 5854 (May 5, 1992) (quoting Intel Corp. v. Hartford Acc. & Indem. Co., 952 F.2d 1551, 1559 (9th Cir. 1991). In Intel Corp. the Ninth Circuit reversed a district court's finding that an insurance company had waived a particular exclusion when it failed to specifically mention it in the initial denial. Prior to the denial letter, however, plaintiff had been informed that the exclusion might apply. Id. at 1561. Moreover, only six months later the insurer mentioned the exclusion in a second denial letter. Id.

The Ninth Circuit contrasted the Intel defendant, who had promptly notified plaintiff of possible exclusions, with defendants who, like F&C in this case, failed to notify plaintiff of new exclusions until much later. Intel, supra at 1560 citing Zumbrun, 719 F.Supp. 890 (in lawsuit filed after it denied a claim, insurer waived affirmative defenses based on policy exclusions insurer failed to assert in letter denying coverage issued fifteen months after insured filed claim.); McLaughlin, 565 F.Supp. at 451 (insurer could not invoke exclusions raised after insured sued due to failure to investigate and raise them prior to litigation). The Intel court approved of these decisions because they fostered full investigation by insurers prior to denial of a claim and discouraged the "sandbagging" of insureds with additional exclusions. Intel, supra at 1560.

Defendant in this case cited only three bases for denial: the two motor vehicle exclusions and the exclusion concerning bodily injury to a resident under the age of 21 in the care of an insured. Unlike the defendant in Intel, F&C neither informally notified plaintiff of other possible exclusions nor raised additional exclusions in subsequent denial letters. Rather, like the defendants in Zumbrun and McLaughlin, defendant in this case waited until long after the commencement of litigation before informing plaintiff of additional exclusions. In fact, F&C only raised the new exclusions after litigation against the insured ended and this third party case reached the summary judgment stage years after the original denial letter. Even under the narrower rule of Intel, defendant's extreme delay justifies the waiver of exclusions not mentioned in the original denial letter.

In Hydro Systems, the insurance company initially relied upon a pollution exclusion clause. At trial, the insured sought to avoid the exclusion through the "products-completed operations hazard" (PCOH) exception to the exclusion clause. The insurance company then sought to rely upon four limitations to the PCOH exception to the pollution exclusion clause and plaintiff objected that the insurance company had waived those bases for denial. The court rejected the waiver argument because "[t]he limitations are an indispensable part of the pollution exclusion clause because they directly modify [an] exception. Therefore, when Continental denied coverage based on the pollution exclusion clause, it necessarily incorporated the limitations." 929 F.2d at 476.

Using the rationale of Hydro Systems, defendant attempts to sweep all of its new defenses under the umbrella of its original bases for denial. The child care services exclusion, however, stands completely apart from the "Definitions of Insured" which simply uses the word "care" as part of the definition. The child care section is in no way an "indispensable part" of the "Definition of Insured" so defendant has waived that claim. In addition, defendant offered to withdraw this defense. That offer is accepted. (Transcript at 53:3-4)

Similarly, defendant's claims that another insurance company's defense relieves an insurer of its duty to defend has no connection whatsoever to the original bases for denial. Undoubtedly, defendant knew of State Farm Automobile's defense because Gary Paden was in constant contact with defendant's counsel. State Farm Fire & Casualty could have raised that defense but failed to do

so. Under well-established principles, defendants have waived the argument.

Defendant has raised the workers compensation exclusion to counter plaintiff's efforts to characterize Richardson as a residence employee. The homeowners policy establishes that the motor vehicle exclusion does not apply to "bodily injury" to a residence employee arising out of and in the course and scope of the residence employee's employment by an insured." In response, defendants have argued that plaintiff was not a residence employee and if he was such an employee then workers compensation provides Richardson's exclusive remedy. Plaintiff's residence employee argument is irrelevant because the serving of alcohol was a concurrent proximate cause independent of the motor vehicle. Because defendant's workers compensation affects only a moot alternative argument that the court will not address, it does not aid the insurer in avoiding liability.

No Collusion & Fraud

Defendant first raises the issue of collusion in their reply to plaintiff's opposition to defendant's motion for summary judgment. (Reply at 40) In a one-page discussion, defendant notes that a court may suspect collusion when a stipulated judgment is disproportionate to the amount plaintiffs could have reasonably recovered. Zander v. Texaco, Inc., 259 Cal.App.2d 793, 66 Cal.Rptr. 561 (1968) In Zander, however, the court noted that a cognizable claim of fraud required allegations that plaintiff

> "had no substantial claim or chance of recovery and that the parties had permitted a judgment in [plaintiff's] favor which was disproportionate to his injuries; also that Casualty had no notice of this in time to intervene."

Id. at 806 (Emphasis added)

Defendants' quote excludes the third element cited by the Zander court; that an insurance company must specifically plead extrinsic fraud which "deprives the unsuccessful party of an opportunity to present his case to the court." Id. at 804.

Defendant of necessity ignores the extrinsic fraud requirement because plaintiff kept State Farm Fire & Casualty fully informed throughout the process of leading up to the settlement. Plaintiff informed defendant of the settlement offer, including the possibility of a $1 million dollar settlement, and defendant refused to appear at the negotiations. Defendant cannot refuse two years of continuing invitations to take part in the litigation and settlement negotiations and then, when the results of settlement are not satisfactory, claim that plaintiff prevented its participation.

IV

CONCLUSION

Under Partridge, the insured's negligent serving of

alcohol was potentially an independent, concurrent proximate cause of plaintiff's injuries independent of the excluded motor vehicle. The motor vehicle exclusion therefore does not bar recovery. Due to the temporary nature of his stay with Ms. Meaders, plaintiff was not a resident of the Meaders' household and is not an insured for purposes of the homeowner's policy. The policy's exclusion for bodily injury of insureds does not bar plaintiff's recovery.

Defendant has waived the child care services exclusion, and the adequate defense claim because it did not raise these issues as bases for the initial denial of a duty to defend. Due to a finding of liability on other grounds, the court need not address either plaintiff's characterization of Richardson as a residence employee or defendants response to that claim. Defendant has not plead any facts indicating that plaintiff and the insured deprived defendant of an opportunity to participate in litigation and negotiations that culminated with the $1 million stipulated judgment.

For the following reasons, plaintiff's motion for summary judgment will be GRANTED. Defendant's motion for summary judgment will be DENIED.

DATED: May 19, 1992

/s/ OLIVER W. WANGER, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARK RICHARDSON,	) Case No. CV-F-91 367 OWW
	)
Plaintiff,	) **UNDISPUTED MATERIAL**
	) **FACTS AND CONCLUSIONS**
vs.	) **OF LAW**
	)
STATE FARM FIRE	)
AND CASUALTY	)
COMPANY,	)
	)
Defendants.	)

JURISDICTION

This court has jurisdiction upon grounds of diversity of citizenship, 28 USC 1332.

INTRODUCTION

The above-entitled cause came on regularly for hearing of cross-motions for summary judgment on February 10, 1992, at 8:30 a.m., before the Honorable

Oliver W. Wanger, United States District Judge, Robert G. Gilmore appeared as counsel for plaintiff and James Robie and Michael O'Neill appeared as counsel for the defendant. The Court examined the proofs offered by the respective parties, listened to argument of counsel, the cause was submitted to the court for decision, the court issued its Memorandum Opinion, considered the proposed findings of fact and conclusions of law submitted by plaintiff, the unobjected to "Statement of Uncontroverted Facts In Support of the Motion for Summary Judgment," defendant's objections to the proposed findings, and now enters the following findings of fact and conclusions of law.

UNDISPUTED MATERIAL FACTS

1. In April, 1988, plaintiff, then age sixteen (16), was residing with his mother after the divorce of his parents.

Stipulation of Facts Not in Dispute - A(2).
Plaintiff's Statement of Uncontroverted Facts in Support of Motion for Summary Judgment, Nos. 1, 9, 10, 22 and 23.
Defendant's Motion for Summary Judgment, Page 1, Lines 21-22.

2. While living with his mother, plaintiff had alcohol and drug problems and he and his mother were experiencing difficulty getting along.

Defendant's Motion for Summary Judgment, Page 1, Lines 21-22.
Plaintiff's Statement of Uncontroverted Facts in Support of Motion for Summary Judgment, Nos. 10, 22 and 23.

3. In April, 1988, an informal agreement was reached between the minor plaintiff and his mother whereby the plaintiff would live temporarily (not to exceed six (6) months) with Ms. Linda Meaders and then return home. The agreement was memorialized by a friend of the plaintiff's mother on a "Probation Supervision Agreement" form but was not under the auspices of any statute, rule, regulation or governmental entity.

Deposition of Linda Richardson Ortiz at 10:8-21; 22:25-26; 23:1-2. Deposition of Linda Meaders, 44:17-26.

4. On or about April 26, 1988, four (4) days prior to the subject accident, plaintiff began living on a temporary basis with Ms. Meaders. He slept on the living room couch. Also living there were Ms. Meaders' two (2) minor daughters and six (6) other unrelated minor boys

and girls also staying there on a temporary basis. Plaintiff did not pay rent no was he charged rent at the Meaders' home.

Plaintiff's Statement of Uncontroverted Facts in Support of Motion for Summary Judgment, Nos. 11, 12, 17, 18, 19 and 20.

5. During this four (4) days prior to the accident, the plaintiff's mother visited him twice at the Meaders' residence and the minor plaintiff visited his mother at her home.

Plaintiff's Statement of Uncontroverted Facts in Support of Motion for Summary Judgment, Nos. 15 and 16.

6. Prior to the accident, the insured Ms. Meaders was aware that the minor plaintiff had an alcohol and drug problem.

Dep. of Linda Meaders at 46:9-26.

7. Prior to the subject accident, the insured Ms. Meaders purchased and provided alcohol for the minor plaintiff and the other minors living at her house on a regular basis and Ms. Meaders consumed alcohol with the minor plaintiff and the other minors on at least

one (1) occasion at her residence.

Plaintiff's Statement of Uncontroverted Facts in Support of Motion for Summary Judgment, Nos. 26, 27, 28, 29, 30, 32 and 33.

8. The minor plaintiff offered, without charge, to perform major repair work to the engine of Ms. Meaders' car. For several days prior to the accident, the plaintiff worked on the car removing its engine (disconnecting motor mounts, wires and the gas line).

Plaintiff's Statement of Uncontroverted Facts in Support of Motion for Summary Judgment, Nos. 36, 37, 39, 40, 42, 43 and 45.

9. Prior to allowing the minor plaintiff to work on the automobile, Ms. Meaders was aware that he would have to pull the engine out of the car, and she was apprehensive about allowing the minor plaintiff to perform such dangerous repair work.

Plaintiff's Statement of Uncontroverted Facts in Support of Motion for Summary Judgment, Nos. 38, 39, 40, 42 and 43. Dep. of Linda Meaders at 54:25-26; 55:1-18.

10. The original and amended complaints in the subject State Court action against the insured Ms. Meaders allege that on the day of the subject accident, and prior to commencing work on the vehicle, the minor plaintiff consumed alcohol furnished by Ms. Meaders.

Plaintiff's Statement of Uncontroverted Facts in Support of Motion for Summary Judgment, No. 46 and complaints in Tulare County Superior Court Case No. 134724.

11. As the plaintiff was reconnecting the gas line, gasoline spilled out of the line and over his body. The gasoline ignited and severely and permanently burned and disfigured his body with third degree burns on his face, neck, chest, back and legs.

Plaintiff's Statement of Uncontroverted Facts in Support of Motion for Summary Judgment, Nos. 47 and 49.

12. The photographs submitted with plaintiff's Motion for Summary Judgment accurately portray the minor's acute burns and his subsequent resulting scars.

Plaintiff's Statement of Uncontroverted Facts in Support of Motion for Summary Judgment, No. 49.

Exhibit 19 to Exhibits to Plaintiff's Motion for Summary Judgment.

13. The minor plaintiff's medical expenses as of the date of demand for settlement, August 8, 1990, was One Hundred Forty-Three Thousand Dollars ($143,000.00) with a need for multiple future surgeries at an estimated cost of One Hundred Thousand Dollars ($100,000.00)

Plaintiff's Statement of Uncontroverted Facts in Support of Motion for Summary Judgment, No. 74.

14. At the time of the accident, Ms. Meaders was the named insured under an automobile insurance policy with State Farm Mutual Automobile Insurance Company with a Twenty-Five Thousand Dollars ($25,000.00) policy limit under a homeowner's policy with a separate and distinct insurance company, i.e., defendant herein, State Farm Fire and Casualty Company, with a single policy limit of Three Hundred Thousand Dollars ($300,000.00).

Stipulated Facts Not in Dispute - D(1) and (2). Plaintiff's Statement of Uncontroverted Facts in Support of Motion for Summary Judgment, Nos. 4 and 5.

15. Between the date of the accident, April 30, 1988, and the date of filing the complaint (hereinafter described) against defendant's insured Ms. Meaders, plaintiff's attorney Robert G. Gilmore sent several letters to the auto insurance company (State Farm Mutual Automobile Insurance Company) raising the issue of potential coverage under Ms. Meaders' homeowner's policy with State Farm Fire and Casualty Company. The stated basis for such potential coverage was the allegation that the insured Ms. Meaders had been permitting the minor plaintiff and other minors to consume alcohol at her residence, that the insured had in fact purchased alcohol for all of said minors and that the minor plaintiff may have been under the influence of said alcohol at the time of the accident. With such correspondence plaintiff's attorney forwarded a copy of the then-unfiled complaint alleging that such providing of alcohol was a proximate cause of plaintiff's injuries. Said correspondence and complaint vas immediately forwarded by the auto company to defendant State Farm Fire and Casualty Company.

Stipuation of Facts Not in Dispute - B.
Exhibit B1 to Exhibits to Stipulation of Facts Not in Dispute.
Plainiff's Statement of Uncontroverted Facts in Support of Motion for Summary Judgnent, Nos. 50, 51, 52 and 53.

16. By correspondence dated October 7, 1988, Mr. Robert Hibbert, employee of defendant State Farm Fire and Casualty Company, acknowledged receipt of the above-referenced correspondence and complaint on behalf of defendant State Farm Fire and Casualty Company.

Plaintiff's Statement of Uncontroverted Facts in Support of Motion for Summary Judgment, No. 53.

17. On October 13, 1988, the above-referenced complaint was filed in the Superior Court, County of Tulare, Action No. 134724, which alleged among other things, that the defendant's insured negligently provided alcohol to the minor and that such negligence was a proximate cause of injury.

Stipulation of Facts Not in Dispute - B.
Exhibit B1 of Exhibits to Stipulation of Facts Not in Dispute.
Plaintiff's Statement of Uncontroverted Facts in Support of Motion for Summary Judgment, No. 54.

18. Of her two insurers, only the auto carrier, State Farm Mutual Automobile Insurance Company with its Twenty-Five Thousand Dollars ($25,000.00) policy limit, accepted Ms. Meaders' tender of defense. It

retained Attorney Gary Paden to represent her.

Stipulation of Facts Not in Dispute - F(2), F(3), F(5), F(7), F(9), F(10) and F(11). Plaintiff's Statement of Uncontroverted Facts in Support of Motion for Summary Judgment, Nos. 56, 57, 74, 75, 76, 77 and 78.

19. On or about October 18, 1988, defendant State Farm Fire and Casualty Company received a coverage opinion letter from its attorney Mr. James Baratta. On the issue of the insured's furnishing of alcohol to the minor as relates to concurrent independent causation, the opinion letter expressly discussed the case of State Farm Fire and Casualty Company v. Partridge (1973) 10 Cal.3d 94, 109 Cal.Rptr. 811. Said opinion letter also discussed the issue of whether coverage would be excluded if the minor was an "insured" under the policy in the sense that the minor might be a "person under the age of twenty-one (21) who is a resident in the care of the named insured." Said opinion expressly acknowledged that this latter exclusion might not apply, stating, "However, it is uncertain whether Mr. Richardson would qualify as an insured under the particular facts of this case . . . As you will note, arguments can be raised both ways." (By subsequent correspondence dated May 31, 1990, Attorney Baratta instructed Ms. Meaders'

attorney Gary Paden to answer an interrogatory concerning defendant State Farm Fire and Casualty Company's position by stating, ". . . State Farm Fire and Casualty Company does have reservations as to whether coverage is afforded Ms. Meaders under the homeowner's policy.")

Plaintiff's Statement of Uncontroverted Facts in Support of Motion for Summary Judgment, Nos. 55, 68, 69 and 70.
Declaration of Robert G. Gilmore in Support of Motion for Summary Judgment.
Deposition of Gary Paden incorporated into Motion for Summary Judgment by Plaintiff's Request for Judicial Notice.
Exhibit 10 to Exhibits to Plaintiff's Motion for Summary Judgment.

20. On October 25, 1988, defendant State Farm Fire and Casualty Company made its decision to deny coverage and refuse to defend its insured Ms. Meaders.

Plaintiff's Statement of Uncontroverted Facts in Support of Motion for Summary Judgment, No. 56.
Deposition of Gary Paden incorporated into Motion for Summary Judgment by Plaintiff's Request for Judicial Notice.

Exhibit 4 to Plaintiff's Exhibits to Motion for Summary Judgment.

21. By correspondence dated November 9, 1988, defendant State Farm Fire and Casualty Company advised its insured Ms. Meaders and plaintiff's attorney Robert G. Gilmore of its denial of coverage, refusal to defend and their basis for such action. The basis for such denial of coverage and the refusal to defend were:

(1) An exclusion for coverage of bodily injury or property damage arising out of the "ownership, maintenance, use, loading or unloading of a motor vehicle owned or operated or rented or loaned to any insured."

(2) An exclusion for coverage for bodily injury or property damage "arising out of the entrustment, negligent supervision, statutory liability or liability assumed through an unwritten or written agreement by any insured with regard to the ownership, maintenance or use of any motor vehicle.

(3) **An exclusion for coverage under the policy for bodily injury to any insured within the meaning of the definition section of the policy (and) the policy defines an insured to include "any person under the age of twenty-one (21) who is in the care of the named insured and a resident of her household."**

Stipulation of Facts Not in Dispute - F(26).
Exhibits 27 and 28 to Exhibits to Stipulated Facts Not in Dispute.
Plaintiff's Statement of Uncontroverted Facts in Support of Motion for Summary Judgment, No. 57.
Declaration of Robert G. Gilmore in Support of Plaintiff's Motion for Summary Judgment.

22. Extensive investigation and discovery was conducted in the underlying State Court action against Ms. Meaders between October 1, 1988, and December, 1990. Ms. Meaders' attorney, Gary Paden, kept defendant State Farm Fire and Casualty Company apprised of such discovery and supplemental pleadings as it was ongoing.

Plaintiff's Statement of Uncontroverted Facts in Support of Motion for Summary Judgment, No. 82.
Declaration of Robert G. Gilmore in Support of Plaintiff's Motion for Summary Judgment.
Exhibits 19, 20, 21 and 22 of Exhibits to Plaintiff's Motion for Summary Judgment.
Deposition of Gary Paden.

23. At all times, defendant State Farm Fire and Casualty Company had available for its inspection, all pleadings of public record in the underlying State Court action against Ms. Meaders. This included without limitation the fact that the trial court overruled Ms. Meaders' demurrer to plaintiff's second amended complaint thereby permitting plaintiff to retain his allegation that the negligent providing of alcohol by Ms. Meaders to the minor plaintiff was a proximate (legal) cause of plaintiff's injuries. This also includes the trial court's ruling allowing the filing of the third amended complaint, which ruling was specifically forwarded to defendant State Farm Fire and Casualty Company by Attorney Gary Paden.

Stipulation of Facts Not in Dispute - B (B1, B2, B3, B4, B5, B6, B7, B8, B9, B10, B11, B12 and B13).

Exhibits B1 through B13 of Exhibits to Stipulation of Facts Not in Dispute.
Deposition of Gary Paden filed in support of Plaintiff's Motion for Summary Judgment.

24. By correspondence dated December 14, 1989, Ms. Meaders' own attorney Gary Paden advised defendant State Farm Fire and Casualty Company of plaintiff's serious injuries and advised defendant State Farm Fire and Casualty Company to defend Ms. Meaders and to do so under a reservation of rights.

Plaintiff's Statement of Uncontroverted Facts in Support of Motion for Summary Judgment, No. 62.
Exhibit 1 to Exhibits to Plaintiff's Motion for Summary Judgment.
Exhibit 6 to Deposition of Gary Paden, incorporated into Summary Judgment Motion by Plaintiff's Request for Judicial Notice.

25. With knowledge of the ongoing discovery, including Ms. Meaders' deposition admission that she in fact served alcohol to the minor plaintiff and other minors in her residence and knowledge of the Court's ruling with respect to retaining the allegations concerning

alcohol and permitting allegations that the plaintiff was a "resident employee", defendant State Farm Fire and Casualty Company continued to refuse to defend its insured after tender of defense by its insured.

Stipulation of Facts Not in Dispute - 5.
Plaintiff's Statement of Uncontroverted Facts in Support of Motion for Summary Judgment, No. 69.
Exhibit 31 to Exhibits to Stipulation of Facts Not in Dispute.
Exhibit 17 to Exhibits to Plaintiff's Motion for Summary Judgment.
Defendant's Statement of Uncontroverted Facts - 10.

26. By correspondence dated August 8, 1990, plaintiff demanded settlement of both policy limits (Twenty-Five Thousand Dollars ($25,000.00) auto policy, Three Hundred Thousand Dollars ($300,000.00) homeowner's policy) or alternatively, plaintiff would seek a stipulated judgment in the sum of One Million Dollars ($1,000,000.00) against Ms. Meaders with an assignment to plaintiff of her assignable rights against defendant State Farm Fire and Casualty Company, giving her in exchange a covenant not to execute upon her personal assets. Said demand letter included a forty-three (43) page legal memorandum on the duty of defendant State

Farm Fire and Casualty Company to defend and indemnity its insured, color photographs showing both the extensive acute burn injuries and the severe and permanent scarring suffered by plaintiff, a statement of present and future medical expenses incurred or to be incurred by plaintiff approximating Two Hundred Fifty Thousand Dollars ($250,000.00) and an express invitation to defendant State Farm Fire and Casualty Company to meet and negotiate with its insured and plaintiff to reach a fair and reasonable resolution with the express proviso that if defendant refused to enter negotiations, it should not be later heard to claim collusion between the minor plaintiff and its insured. A separate and complete demand package was sent to and received by both the auto carrier and defendant State Farm Fire and Casualty Company.

Stipulation of Facts Not in Dispute - 9 and 10.
Exhibit 30 to Exhibits to Stipulation of Facts Not in Dispute.

27. After review of said demand letter, defendant continued its refusal to defend its insured, continued to deny coverage and refused to enter settlement negotiations on behalf of its insured. Such refusal was communicated by defendant's Attorney

Baratta to Ms. Meaders' attorney Gary Paden on September 7, 1990.

Stipulation of Facts Not in Dispute - 11.
Exhibit 31 to Exhibits to Stipulation of Facts Not in Dispute.

28. On October 22, 1990, Ms. Meaders executed a document entitled "ASSIGNMENT OF ACTION - COVENANT NOT TO EXECUTE" whereby she agreed to stipulate to a One Million Dollar ($1,000,000.00) judgment against her and in favor of plaintiff. The assignment transferred all Ms. Meaders' assignable rights against her insurer State Farm Fire and Casualty Company, to plaintiff in return for a covenant not to execute or otherwise enforce his judgment against Ms. Meaders.

Stipulation of Facts Not in Dispute - 12.
Exhibit C22 to Exhibits to Stipulation of Facts Not in Dispute.

29. On November 29, 1990, a stipulation for entry of a judgment in the sum of One Million Dollars ($1,000,000.00) against Ms. Linda Meaders and in favor of plaintiff was filed in Tulare County, Superior Court, Action No. 134724.

Stipulation of Facts Not in Dispute - 12. Exhibit B20 to Exhibits to Stipulation of Facts Not in Dispute.

30. On December 11, 1990, a judgment in the Tulare County Superior Court, Action No. 134724, in the sum of One Million Dollars ($1,000,000.00) was entered upon the above stipulation for entry of judgment against Linda Meaders and in favor of plaintiff herein.

Stipulation of Facts Not in Dispute - 13. Exhibit B21 to Exhibits to Stipulation of Facts Not in Dispute.

31. State Farm Mutual Automobile Insurance Company partially satisfied this judgment by payment of its policy limit in the sum of Twenty-Five Thousand Dollars ($25,000.00) to Mark Richardson.

Stipulation of Facts Not in Dispute - 14.

32. Defendant never defended its insured nor sought a judicial declaration of its rights/obligations with respect to the underlying State Court action.

Defendant's Statement of Uncontroverted Facts, No. 10.

33. Plaintiff's claim against Ms. Meaders for bodily injury arising from her alleged negligence falls within the general coverage (SECTION II - Subsection L) of the subject homeowner's policy issued by defendant State Farm Fire and Casualty Company, to wit:

"SECTION II - Liability Coverages

"Coverage L - Personal Liability

"If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage to which this coverage applies, caused by an occurrence, we will:

1. Pay up to our limit of liability for the damages for which the insured is legally liable; and

2. Provide a defense at our expense by counsel of our choice. We will make any investigation and settle any claim or suit that we decide is appropriate. Our obligation to defend any claim or suit ends when the amount we pay for damages, to effect settlement or satisfy a

judgment resulting from the occurrence, equals our limit of liability."

Stipulation of Facts Not in Dispute - D(1). Exhibit D23a to Exhibits to Stipulation of Facts Not in Dispute.

34. The original complaint in the underlying State Court action by plaintiff against Ms. Meaders alleged negligence against Ms. Meaders, as an adult, in providing and making alcohol available to a sixteen (16) year old minor.

Stipulation of Facts Not in Dispute - B(1). Plaintiff's Statement of Uncontroverted Facts in Support of Motion for Summary Judgment, Nos. 1, 6, 10, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 and 46.

35. Plaintiffs alleged in the underlying State action that the negligent providing of alcohol by Ms. Meaders, was a proximate (legal) cause of the minor plaintiff's injuries, which proximate cause was a concurrent cause independent of the excluded instrumentality, i.e., the subject automobile, because such negligence could result in injury without the fortuitous involvement of any automobile, all of which created the

potential for coverage under defendant's homeowner's policy issued to Ms. Meaders.

Stipulation of Facts Not in Dispute - D(1). Plaintiff's Statement of Uncontroverted Facts in Support of Motion for Summary Judgment, Nos. 1, 6, 10, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 45, 46 and 47.

36. It was not until three (3) years post-accident and not until the present litigation was commenced against it that defendant State Farm and Casualty Company raised, for the first time, the policy exclusions for "child care services" and the defense based upon the fact that another carrier was providing a defense. Defendant withdrew the "child care services" defense during oral argument on the cross-motions for summary judgment.

Defendant's Answer to Plaintiff's Complaint against Defendant State Farm Fire and Casualty Company as incorporated in Plaintiff's Motion of Summary Judgment by Plaintiff's Request for Judicial Notice.
All Stipulations of Facts Not in Dispute.
All of Plaintiff's Statement of Uncontroverted Facts in Support of Motion

for Summary Judgment.
All of Defendant's Statement of Undisputed Facts.
All Exhibits to Plaintiff's Statement of Uncontroverted Facts.
All Exhibits to Stipulation of Facts Not in Dispute.
Transcript at 53:3-4.

37. Defendant State Farm Fire and Casualty Company expressly elected not to settle the claim of Richardson for its Three Hundred Thousand Dollars ($300,000.00) policy limit after demand for same and refused to negotiate on its insured's behalf by making any counter-offer.

Stipulation of Facts Not in Dispute - 11.
Defendant's Statement of Uncontroverted Facts, No. 10.
Plaintiff's Statement of Uncontroverted Facts in Support of Motion for Summary Judgment, Nos. 74, 75, 76, 77 and 78.

38. The minor plaintiff and defendant's insured Ms. Meaders did not collude, conspire to defraud defendant and in fact did not defraud defendant in negotiating the stipulated judgment in the underlying

State action and the ASSIGNMENT OF ACTION - COVENANT NOT TO EXECUTE.

Stipulation of Facts Not in Dispute - B(1) through B(21).
Stipulation o Facts Not in Dispute - F(1), F(2), F(4), F(5), F(6), F(7), F(9), F(10), F(11), F(12) and F(13).
Plaintiff's Statement of Uncontroverted Facts in Support of Motion for Summary Judgment, Nos. 52, 53 and 55 through 82.
Defendant's Statement of Uncontroverted Facts, Nos. 7 and 10.

39. The issue of defendants' bad faith refusal to defend plaintiff, its insured, and settle within policy limits was raised in plaintiffs' Motion for Summary Judgment at pp. 6:17-19, 37:11-51:12.

CONCLUSIONS OF LAW

1. In this diversity of citizenship case, the court must look to the substantive law of the forum state, California. Erie R.R. Co. v. Tompkins, 304 U.S. 69, 78, 58 S.Ct. 817 (1938).

2. The original and all amended complaints against defendant's insured Ms. Meaders (plaintiff's assignor) filed in the Superior Court of the State of California, County of Tulare, Action No. 134724, stated claims which fell within the general coverage (SECTION II - Subsection L) of Ms. Meaders' homeowner's liability policy, Policy No. 75-X7-5538-8, issued by defendant State Farm Fire and Casualty Company, which policy was valid and in force and effect at the time of the subject accident of April 30, 1988. For purposes of reference only, said SECTION II - Subsection L is set forth herein:

"SECTION II - LIABILITY COVERAGES

"COVERAGE L - PERSONAL LIABILITY

If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage to which this coverage applies, caused by an occurrence, we will:

1. Pay up to our limit of liability for the damages for which the insured is legally liable; and

> **2. Provide a defense at our expense by counsel of our choice. We may make any investigation and settle any claim or suit that we decide is appropriate. Our obligation to defend any claim or suit ends when the amount we pay for damages, to effect settlement or satisfy a judgment resulting from the occurrence, equals our limit of liability."**

An "occurrence" is defined under the "DEFINITIONS" section of the policy at Page 2 as follows:

> **"'Occurrence' when used in Section II of this policy, means an accident, including exposure to conditions which result in:**
>
> **(a) Bodily Injury."**

Authority:

1. Defendant concedes that the claim against its insured Ms. Meaders in said action falls within said

general coverage provision, however, denied coverage under certain exclusions.

2. Stipulation of Facts Not in Dispute, D1.

3. Exhibits D23a and D23b to Exhibits to Stipulation of Facts Not in Dispute.

4. Plaintiff's Statement of Uncontroverted Facts, No. 57.

5. Defendant's Statement of Uncontroverted Facts, Nos. 3 and 4.

3. Plaintiff's original and all amended complaints filed against defendant's insured Ms. Meaders in the Superior Court, County of Tulare, Action No. 134724, alleged Ms. Meaders negligently provided alcohol to the minor plaintiff and that said negligence was a concurrent proximate (legal) cause of plaintiff's injuries. Said alleged negligence and alleged causation was independent of the excluded instrumentality under defendant's insurance policy, a motor vehicle, because such negligent furnishing of alcohol was not dependent upon the fortuitous involvement of any motor vehicle to cause injury. Plaintiff's pleadings created the potential for coverage under defendant's homeowner's policy.

Authority:

1. California Insurance Code Sections 530 and 532.

2. State Farm Mutual Automobile Insurance Company v. Partridge (1973) 10 Cal.3d 94, 109 Cal.Rptr. 811.

3. Garvey v. State Farm Fire and Casualty Company (1989) 48 Cal.3d 395, 257 Cal.Rptr. 292.

4. Mission National Insurance Company v. Coachella Valley Water District (1989) 210 Cal.App.3d 484, 491.

5. Glens Falls Insurance Company v. Rich (1975) 49 Cal.App.3d 390, 122 Cal.Rptr. 696.

6. State Farm Fire and Casualty Company v. Kohl (1982) 131 Cal.App.3d 1031, 182 Cal.Rptr. 720.

7. Ohio Casualty Insurance Company v. Hartford Accident and Indemnity Company (1983) 148 Cal.App.3d 641.

8. Underwriters Insurance Company v. Purdi (1983) 145 Cal.App.3d 57, 193 Cal.Rptr. 248.

4. Neither of the motor vehicle exclusions, SECTION II - Exclusions Sub 1(e) and (f), operated to relieve, excuse or negate the duty of defendant State Farm Fire and Casualty Company to defend its insured Ms. Meaders in plaintiff's lawsuit against her, Tulare County Superior Court Action 134724. Those exclusions are:

"SECTION II - EXCLUSIONS

"1. Coverage L and Coverage M do not apply to:

> **(e) Bodily injury or property damage arising out of the ownership, maintenance, use, loading or unloading of: . . .**
>
> > **(2) A motor vehicle owned or operated by or rented or loaned to any insured; or . . .**
> >
> > **This exclusion does not apply to bodily injury to a residence employee arising out of and in the course of the residence**

e m p l o y e e ' s employment by an insured . . . ."

(f) Bodily injury or property damage arising out of:

(1) The entrustment by any insured to any person;

(2) The negligent supervision by any insured of any person;

(3) Any liability statutorily imposed on any insured; or

(4) Any liability assumed through an unwritten or written agreement by any insured;

With regard to the ownership,

**maintenance,
or use of any . .
. motor vehicle
. . . ."**

Authority:

1. California Insurance Code Sections 530 and 532.

2. State Farm Mutual Automobile Insurance Company v. Partridge (1973) 10 Cal.3d 94, 109 Cal.Rptr. 811.

3. Garvey v. State Farm Fire and Casualty Company (1989) 48 Cal.3d 395, 257 Cal.Rptr. 292.

4. Mission National Insurance Company v. Coachella Valley Water District (1989) 210 Cal.App.3d 484, 491.

5. Glen Falls Insurance Company v. Rich (1975) 49 Cal.App.3d 390, 122 Cal.Rptr. 696.

6. State Farm Fire and Casualty Company v. Kohl (1982) 131 Cal.App.3d 1031, 182 Cal.Rptr. 720.

7. Ohio Casualty Insurance Company v. Hartford Accident and Indemnity Company (1983) 148 Cal.App.3d 641.

8. Underwriters Insurance Company v. Purdi (1983) 145 Cal.App.3d 57, 193 Cal.Rptr. 248.

5. The minor plaintiff's legal residence on the date of the accident, April 30, 1988, remained at his mother's home and had not changed to that of the insured Ms. Meaders for purposes of the applicability of the subject insurance policy. As such, the "resident" insured exclusion (SECTION II, Sub 1(h)) did not operate to relieve, excuse, or negate the duty of defendant State Farm Fire and Casualty Company to defend its insured Ms. Meaders in plaintiff's lawsuit against her, to wit, Tulare County Superior Court Action No. 134724. The exclusion is as follows:

"II - EXCLUSIONS

"1. Coverage L and Coverage M do not apply to:

> **(h) Bodily injury to you or any insured within the meaning of part a or part b of the definition of insured;**

The definition of insured is contained on page 1 of the policy and states as follows:

'Insured' means you and, if residents of your household;

(a) Your relatives;

(b) Any other person under the age of 21 who is in the care of a person described above." (Emphasis added)

Authority:

1. California Government Code Section 244.

2. Safeco Insurance Company v. Gibson (1989) 211 Cal.App.3d 176, 259 Cal.Rptr. 206.

3. Northwestern National Casualty Company v. Davis (1979) 90 Cal.App.3d 782, 153 Cal.Rptr. 556.

4. Allstate Insurance Company v. Smith (1970) 9 Cal.App.3d 898, 88 Cal.Rptr. 593.

5. State Farm Mutual Automobile Insurance Company v. Elkins (1975) 52 Cal.App.3d 534.

6. Island v. Fireman's Fund Indemnity (1947) 30 Cal.2d 541.

7. Shapiro v. Republic Indemnity Company (1959) 52 Cal.2d 437.

8. Cal-Farms Insurance Company v. Boisseranc (1957) 151 Cal.App.2d 775.

9. Hardware Mutual Casualty Company v. Home Indemnity Company (1966) 241 Cal.App.2d 303, 50 Cal.Rptr. 508.

10. Reserve Insurance Company v. Apps (1978) 85 Cal.App.3d 228, 149 Cal.Rptr. 223.

11. Farmers Insurance Company of Arizona v. Oliver (Ariz. App. 1987) 741 P.2d 307.

12. Country Mutual Insurance Company v. Watson (Ill. App. 1971) 274 N.E.2d 136.

13. 13 POF 2d "Resident of Household", pp. 685-687.

6. The policy exclusion for ("Child Care Services" - SECTION II, Sub 1(i)) did not operate to relieve, excuse or negate the duty of defendant State Farm Fire and Casualty Company to defend its insured Ms. Meaders in plaintiff's lawsuit against her, tulare County Superior Court, Action No. 134724. Defendant's failure to timely raise this exclusion constitutes a waiver. Defendant's expressly withdrew this defense during oral argument on the parties' cross-motions for summary judgment. For reference purposes, said exclusion is set forth as follows:

"SECTION II - EXCLUSIONS

"1. Coverage L and Coverage M do not apply to:

(i) The legal liability of any insured to:

1. Any person who is in the care of any insured because of child care services provided by or at the direction of:

(a) Any insured;

(b) Any employee of any insured; or

(c) Any other person actually or apparently acting on behalf of any insured.

2. Any person who makes a claim because of bodily injury to any person who is in the care of any insured because of child care services provided by or at the direction of:

(a) Any insured;

(b) Any employee of any insured; or

(c) Any other person actually

or apparently acting on behalf of any insured.

This exclusion does not apply to the occasional child care services provided by any insured, or to the part time child care services provided by any insured who is under 19 years of age."

Authority:

1. Defendant withdrew this defense during oral argument. Transcript at 53:3-4.

2. Egan v. Mutual of Omaha (1979) 24 Cal.3d 809, 818-819, 169 Cal.Rptr. 691, 695-696.

3. Hydro Systems, Inc. v. Continental Insurance Company 929 F.2d 472, at 475-476 (9th Cir. 1991)

4. Zumbrun v. United Services Auto Association 719 F.Supp. 890 (E.D. California 1989).

5. McLaughlin v. Connecticut General Life

Insurance Company 565 F.Supp. 434, 451 (N.D. California 1983)

6. Becker v. State Farm Fire and Casualty Company 664 F.Supp. 460, 461 (N.D. California 1987)

7. Garcia v. Calfarm Insurance Company 92 D.A.R. 5851, 5854 (May 5, 1992) (quoting Intel Corporation v. Hartford Acc. and Indemnity Company, 952 F.2d 1551, 1559 (9th Cir. 1991)).

8. Intel Corporation v. Hartford Acc. and Indemnity Company, 952 F.2d 1551, 1559 (9th Cir. 1991).

7. The exclusion for child care services is a separate and distinct exclusion from the exclusion for "any insured" upon which defendant State Farm Fire and Casualty Company based its denial of coverage. This latter exclusion is contained on Page 15, SECTION II, Subsections 1, subsection (h) and refers to exclusion of any insured as defined in subsections a. and b. of the definition of "insured" located on Page 1 of the policy. The former exclusion (child care) is contained in SECTION II, Sub 1, sub (i) and sets forth a definition different from "any insured" under the definitions section of the policy. The "child care services" exclusion was not relied upon by defendant State Farm Fire and Casualty Company as a basis for its denial of coverage.

Stipulation of Facts Not in Dispute - D(1). Exhibit D23a to Exhibits to Stipulation of Facts Not in Dispute
Federal Trial Court's acceptance of defendant's offer to withdraw said "child care" exclusion/defense. (Transcript at 53:3-4).

8.The defense raised by defendant State Farm Fire and Casualty Company to the effect that it owed no duty to defend its insured Ms. Meaders because a different insurance carrier was defending her did not operate to relieve or excuse the duty of defendant State farm Fire and Casualty Company to defend and indemnity its insured Ms. Meaders in plaintiff's lawsuit against her, Tulare County Superior Court Action 134724. Defendant State Farm Fire and Casualty Company waived this defense by its failure to expressly rely on that exclusion which would have been disclosed by a reasonable investigation.

Authority:

1. Egan v. Mutual of Omaha (1979) 24 Cal.3d 809, 818-819, 169 Cal.Rptr. 691, 695-696.

2. Hydro Systems, Inc. v. Continental Insurance Company 929 F.2d 472, at 475-476 (9th Cir. 1991).

3. Zumbrun v. United Services Auto Association 719 F.Supp. 890 (E.D. California 1989).

4. McLaughlin v. Connecticut General Life Insurance Company 565 F.Supp. 434, 451 (N.D. California 1983).

5. Becker v. State Farm Fire and Casualty Company 664 F.Supp. 460, 461 (N.D. California 1987).

6. Garcia v. Calfarm Insurance Company 92 D.A.R. 5851, 5854 (May 5, 1992) (quoting Intel Corporation v. Hartford Acc. and Indemnity Company, 952 F.2d 1551, 1559 (9th Circ. 1991)).

7. Intel Corporation v. Hartford Acc. and Indemnity Company, 952 F.2d 1551, 1559 (9th Circ. 1991)).

9. Defendant State Farm Fire and Casualty Company had a duty to defend its insured, Ms. Meaders, in the minor plaintiff's Superior Court action, Action No. 134724. The basis of such duty arises from the fact that the minor plaintiff's original and all amended complaints stated claims against Ms. Meaders which created the potential for insurance coverage for Ms. Meaders under the subject homeowner's policy, Policy No. 75-X7-5538-8,

issued by defendant State Farm Fire and Casualty Company to its insured Ms. Meaders.

Authority:

1. Gray v. Zurich (1966) 65 Cal.2d 263, 54 Cal.Rptr. 104.

2. Aetna Casualty and Surety Company v. Certain Underwriters (1976) 56 Cal.App.3d 791, 129 Cal.Rptr. 47.

3. Ohio Casualty Insurance Company v. Hubbard (1984) 162 Cal.App.3d 939, 208 Cal.Rptr. 806.

4. Eichler Homes, Inc. v. Underwriters at Lloyd's London (1965) 238 Cal.App.2d 532, 47 Cal.Rptr. 843.

5. CNA Casualty of California v. Seaboard Surety Company (1986) 176 Cal.App.3d 598, 222 Cal.Rptr. 276.

6. California Shoppers, Inc. v. Royal Globe Insurance Company (1985) 175 Cal.App.3d 1, 221 Cal.Rptr. 171.

10. Plaintiff obtained a valid assignment of Ms. Meaders' assignable rights against defendant State Farm Fire and Casualty Company for defendant's failure and refusal to defend Ms. Meaders after tender and for defendant's unreasonable failure and refusal to settle within the policy limits of Three Hundred Thousand Dollars ($300,000.00), upon demand.

Authority:

1. Consolidated American Insurance Company v. Mike Soper Marine Services 942 F.2d 1421 (9th Circ. 1991).

2. Crisci v. Security Insurance Company (1967) 66 Cal.2d 425, 429, 58 Cal.Rptr. 13.

3. Comunale v. Traders and General Insurance Company (1958) 50 Cal.2d 654, 328 P.2d 198.

4. Samson v. Transamerica Insurance Company (1981) 30 Cal.3d 220, 241, 178 Cal.Rptr. 343.

5. California Practice Guide - Bad Faith (1990), Kornblum, Kaufman, Levine, Sections 1:10, 3:10.3, 7:51, 7:204 through 7:210.

11. The defense raised by defendant State Farm Fire and Casualty Company to the effect that the alleged consumption of alcohol by the minor plaintiff was not in fact an actual cause of plaintiff's injuries is irrelevant to defendant's duty to defend as such duty emanates from the potential for coverage based upon the allegations of the complaint - not upon a belated analysis of cause in fact.

Authority:

1. Gray v. Zurich (1966) 65 Cal.2d 263, 54 Cal.Rptr. 104.

2. Aenta Casualty and Surety Company v. Certain Underwriters (1976) 56 Cal.App.3d 791, 129 Cal.Rptr. 47.

3. Ohio Casualty Insurance Company v. Hubbard (1984) 162 Cal.App.3d 939, 208 Cal.Rptr. 806.

4. Eichler Homes, Inc. v. Underwriters at Lloyd's London (1965) 238 Cal.App.2d 532, 47 Cal.Rptr. 843.

5. CNA Casualty of California v. Seaboard Surety Company (1986) 176 Cal.App.3d 598, 222 Cal.Rptr. 276.

6. California Shoppers, Inc. v. Royal Globe Insurance Company (1985) 175 Cal.App.3d 1, 221 Cal.Rptr. 171.

12. Defendant State Farm Fire and Casualty Company breached its duty to defend its insured Ms. Meaders in the minor plaintiff's action against her, Action No. 134724, filed in the Superior Court, County of Tulare.

Authority:

1. Gray v. Zurich (1966) 65 Cal.2d 263, 54 Cal.Rptr. 104.

2. Aenta Casualty and Surety Company v. Certain Underwriters (1976) 56 Cal.App.3d 791, 129 Cal.Rptr. 47.

3. Ohio Casualty Insurance Company v. Hubbard (1984) 162 Cal.App.3d 939, 208 Cal.Rptr. 806.

4. Eichler Homes, Inc. v. Underwriters at Lloyd's London (1965) 238 Cal.App.2d 532, 47 Cal.Rptr. 843.

5. CNA Casualty of California v. Seaboard Surety Company (1986) 176 Cal.App.3d 598, 222 Cal.Rptr. 276.

6. California Shoppers, Inc. v. Royal Globe Insurance Company (1985) 175 Cal.App.3d 1, 221 Cal.Rptr. 171.

13. Defendant State Farm Fire and Casualty Company breached its duty of good faith and fair dealing to its insured Ms. Meaders by refusing to defend her against allegations raising the potential for coverage, basing its refusal in part upon SECTION II, Sub 1(h) of the policy, even after its own attorney had advised it that such exclusion may not apply and by operating against its insured's interest by coordinating with her own attorney to exclude pleadings which would expand coverage for its insured.

Authority:

1. Gray v. Zurich (1966) 65 Cal.2d 263, 54 Cal.Rptr. 104.

2. Comunale v. Traders and General Insurance Company (1958) 50 Cal.2d 654, 659, 328 P.2d 198.

3. Arenson v. National Auto and Casualty Company (1955) 45 Cal.2d 81, 286 P.2d 816.

4. Seward v. State Farm Mutual Automobile Insurance Company 392 F.2d 723 (5th Cir. 1968).

5. Dairyland Insurance Company v. Hawkins 292 F.Supp. 947 (D.C.S.D. Iowa 1968).

6. Myers v. Farm Bureau Mutual Insurance Company (1968) 14 Mich.App. 277, 165 N.W.2d 308.

7. Lande v. Century Indemnity Company (Miss.App. 1965) 390 S.W.2d 558.

8. State Farm Mutual Automobile Insurance Company v. Allstate Insurance Company (1970) 9 Cal.App.3d 508, 88 Cal.Rptr. 246.

9. Tomerlin v. Canadian Indemnity Company (1964) 61 Cal.2d 638, 39 Cal.Rptr. 731.

10. Mullen v. Glen Falls Insurance Company (1977) 73 Cal.App.3d 163, 140 Cal.Rptr. 605.

11. State Farm Mutual Automobile Insurance Company v. Flynt (1971) 17 Cal.App.3d 538, 95 Cal.Rptr. 296.

12. California Practice Guide - Bad Faith (1990), Kornblum, Kaufman, Levine, Sections 1:2, 1:3 and 1:4.

14. Defendant State Farm Fire and Casualty Company breached its duty of good faith and fair dealing, i.e., failing to act as a reasonably prudent insurer under the circumstances, by refusing to settle the plaintiff's claim against its insured Ms. Meaders within the policy limits of Three Hundred Thousand Dollars ($300,000.00), upon demand, and failing and refusing to negotiate on behalf of its insured with any counter-offers.

Authority:

1. Gray v. Zurich (1966) 65 Cal.2d 263, 54 Cal.Rptr. 104.

2. Comunale v. Traders and General Insurance Company (1958) 50 Cal.2d 654, 659, 328 P.2d 198.

3. Arenson v. National Auto and Casualty Company (1955) 45 Cal.2d 81, 286 P.2d 816.

4. Seward v. State Farm Mutual Automobile Insurance Company 392 F.2d 723 (5th Cir. 1968).

5. Dairyland Insurance Company v. Hawkins 292 F.Supp. 947 (D.C.S.D. Iowa 1968).

6. Myers v. Farm Bureau Mutual Insurance Company (1968) 14 Mich.App. 277, 165 N.W.2d 308.

7. Lande v. Century Indemnity Company (Miss.App. 1965) 390 S.W.2d 558.

8. State Farm Mutual Automobile Insurance Company v. Allstate Insurance Company (1970) 9 Cal.App.3d 508, 88 Cal.Rptr. 246.

9. Tomerlin v. Canadian Indemnity Company (1964) 61 Cal.2d 638, 39 Cal.Rptr. 731.

10. Mullen v. Glen Falls Insurance Company (1977) 73 Cal.App.3d 163, 140 Cal.Rptr. 605.

11. State Farm Mutual Automobile Insurance Company v. Flynt (1971) 17 Cal.App.3d 538, 95 Cal.Rptr. 296.

12. California Practice Guide - Bad Faith (1990), Kornblum, Kaufman, Levine, Sections 1:2, 1:3 and 1:4.

15. There was no collusion to defraud and no intrinsic or extrinsic fraud upon defendant State Farm Fire and Casualty Company by or between the minor plaintiff and defendant's insured Ms. Meaders in entering into the stipulated judgment for One Million Dollars ($1,000,000.00) for the following reasons:

(1) **Defendant was requested to defend its insured two and one-half (2-1/2) years prior to entry of said judgment;**

(2) **Defendant had available to it and was advised of all aspects of the underlying litigation against its insured as it occurred;**

(3) **Prior to settlement, defendant was presented by plaintiff and its insured specific information supporting demand for the policy limit or alternatively a One Million Dollar ($1,000,000.00) stipulated judgment with assignment of its insured's rights to sue defendant State Farm Fire and Casualty Company for bad faith;**

(4) **Defendant was expressly invited to join settlement negotiations; and**

(5) **Defendant was advised two (2) years earlier on by its insured's attorney, Gary Paden, to defend with reservations of rights.**

Authority:

1. Zander v. Texaco, Inc. (1968) 259 Cal.App.2d 793, 66 Cal.Rptr. 561. (Cited with approval in Samson v. Transamerica Insurance Company (1981) 30 Cal.3d 220).

2. Wint v. Fidelity and Casualty Insurance Company (1973) 9 Cal.3d 257.

3. Critz v. Farmers Insurance Company (1964) 230 Cal.App.2d 788, 41 Cal.Rptr. 401.

16. Based upon defendant's bad faith denial of its duty to defend its insured and its failure and unreasonable refusal to settle or to negotiate a settlement within its policy limits of Three Hundred Thousand Dollars ($300,000.00), upon demand, Defendant State Farm Fire and Casualty Company is obligated to pay the full amount of the judgment against its insured Ms. Meaders in the amount of One Million Dollars ($1,000,000.00) (less credit of Twenty-Five Thousand Dollars ($25,000.00) paid by the other carrier) plus interest at the rate provided by law from and after the date of entry of said judgment, i.e., December 11, 1990.

Authority:

1. Consolidated American Insurance Company v. Mike Soper Marine Services 942 F.2d 1421 (9th Cir. 1991).

2. Gray v. Zurich (1966) 65 Cal.2d 263, 54 Cal.Rptr. 104.

3. Comunale v. Traders and General Insurance Company (1958) 50 Cal.2d 654, 659, 328 P.2d 198.

4. Arenson v. National Auto and Casualty Company (1955) 45 Cal.2d 81, 286 P.2d 816.

5. Seward v. State Farm Mutual Automobile Insurance Company 392 F.2d 723 (5th Cir. 1968).

6. Dairyland Insurance Company v. Hawkins 292 F.Supp. 947 (D.C.S.D. Iowa 1968).

7. Myers v. Farm Bureau Mutual Insurance Company (1968) 14 Mich.App. 277, 165 N.W.2d 308.

8. Lande v. Century Indemnity Company (Miss.App. 1965) 390 S.W.2d 558.

9. State Farm Mutual Automobile Insurance

Company v. Allstate Insurance Company (1970) 9 Cal.App.3d 508, 88 Cal.Rptr. 246.

10. Tomerlin v. Canadian Indemnity Company (1964) 61 Cal.2d 638, 39 Cal.Rptr. 731.

11. Mullen v. Glen Falls Insurance Company (1977) 73 Cal.App.3d 163, 140 Cal.Rptr. 605.

12. State Farm Mutual Automobile Insurance Company v. Flynt (1971) 17 Cal.App.3d 538, 95 Cal.Rptr. 296.

13. California Practice Guide - Bad Faith (1990), Kornblum, Kaufman, Levine, Sections 1:2, 1:3 and 1:4.

17. Pursuant to a valid assignment of rights, plaintiff Mark Richardson is entitled to judgment in his favor and against defendant State Farm Fire and Casualty Company in the amount of Nine Hundred Seventy-Five Thousand Dollars ($975,000.00) plus interest at the rate provided by law from and after December 11, 1990, plus costs and attorney's fees to be determined pursuant to Brandt v. Superior Court (1985) 37 Cal.3d 813, 210 Cal.Rptr. 211 and by Rules 292 and 293 of the Local Rules of the Eastern District of California.

Authority:

1. Consolidated American Insurance Company v. Mike Soper Marine Services 942 F.2d 1421 (9th Cir. 1991).

2. Gray v. Zurich (1966) 65 Cal.2d 263, 54 Cal.Rptr. 104.

3. Comunale v. Traders and General Insurance Company (1958) 50 Cal.2d 654, 659, 328 P.2d 198.

4. Arenson v. National Auto and Casualty Company (1955) 45 Cal.2d 81, 286 P.2d 816.

5. Seward v. State Farm Mutual Automobile Insurance Company 392 F.2d 723 (5th Cir. 1968).

6. Dairyland Insurance Company v. Hawkins 292 F.Supp. 947 (D.C.S.D. Iowa 1968).

7. Myers v. Farm Bureau Mutual Insurance Company (1968) 14 Mich.App. 277, 165 N.W.2d 308.

8. Lande v. Century Indemnity Company (Miss.App. 1965) 390 S.W.2d 558.

9. State Farm Mutual Automobile Insurance

Company v. Allstate Insurance Company (1970) 9 Cal.App.3d 508, 88 Cal.Rptr. 246.

10. Tomerlin v. Canadian Indemnity Company (1964) 61 Cal.2d 638, 39 Cal.Rptr. 731.

11. Mullen v. Glen Falls Insurance Company (1977) 73 Cal.App.3d 163, 140 Cal.Rptr. 605.

12. State Farm Mutual Automobile Insurance Company v. Flynt (1971) 17 Cal.App.3d 538, 95 Cal.Rptr. 296.

13. California Practice Guide - Bad Faith (1990), Kornblum, Kaufman, Levine, Sections 5:103, 6:74, 7:70, 11:85 through 11:86, 11:88 through 11:89, 11:92.1, 11:93 through 11:94, 11:96.1, 11:96.3, 11:99, 11:101 through 11:104.

14. Brandt v. Superior Court (1985) 37 Cal.3d 813, 210 Cal.Rptr. 211.

15. California Constitution, Article 15, Section 1.

DATED: August 7, 1992

/s/ OLIVER W. WANGER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

*****

MARK RICHARDSON,	)	Case No. CV-F-91 367 OWW
	)	
Plaintiff,	)	**JUDGMENT**
	)	
vs.	)	
	)	
STATE FARM FIRE	)	
AND CASUALTY	)	
COMPANY,	)	
	)	
Defendants.	)	

This action came on for hearing upon the parties' cross-motions for summary judgment before the Court, the Honorable Oliver W. Wanger, District Judge, presiding, based upon the Stipulations of Facts Not in Dispute jointly submitted by the parties hereto, based upon such other and further pleadings and papers filed in support of said motions, the Court having issued its Memorandum of Opinion ordering summary judgment in favor of plaintiff and having issued Undisputed Facts and Conclusions of Law herein, IT IS ORDERED AND ADJUDGED that plaintiff MARK RICHARDSON recover from the defendant STATE FARM FIRE AND CASUALTY COMPANY, the sum of Nine Hundred Seventy-Five Thousand Dollars ($975,000.00) with interest thereon at the legal rate of ten percent (10%) per annum from and

after December 11, 1990, and his costs and attorneys fees both to be determined in subsequent proceedings hereto.

Dated at Fresno, California, this 31st day of July, 1992.

/s/ OLIVER W. WANGER, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

*****

MARK RICHARDSON, Plaintiff, vs. STATE FARM FIRE AND CASUALTY COMPANY, Defendants.	Case No. CV-F-91 367 OWW **AMENDMENT TO JUDGMENT**

Pursuant to order of this Court entered September 28, 1992, the judgment previously entered in this matter on August 6, 1992, is amended in the following specifics:

1. Plaintiff is to recover attorneys fees from defendant State Farm Fire and Casualty Company under Brandt v. Superior Court in the sum of $44,000 based upon the Court's finding that 220 hours as a reasonable expenditure of time by plaintiff's counsel with said time compensated at the rate of $200 per hour.

2. Plaintiff shall recover costs from State Farm Fire and Casualty Company as follows:

(1) Fees of the Clerk - $247.25

(2) Fees for service of Summon and a Subpoena - $247.25

(3) Fees for exemplification and copies of papers necessarily obtained for use in the case - $619.00

(4) Other costs (two depositions) - $678.80

TOTAL $1,792.30

3. Plaintiff is entitled to receive prejudgment interest at the legal rate of ten percent (10%) per annum on Nine Hundred Seventy-Five Thousand Dollars ($975,000) from December 11, 1990 until August 6, 1992.

4. Plaintiff shall be entitled to interest on this federal court judgment beginning on August 6, 1992 pursuant to 28 U.S.C. Section 1961(a) which equates to 3.51 percent.

Dated at Fresno, California, this 7th day of Oct. 1992.

/s/ OLIVER W. WANGER, JUDGE
UNITED STATES DISTRICT COURT

LODGED: 10/7/92

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK RICHARDSON,	)	No. 92-16755
	)	
Plaintiff-Appellee,	)	D.C. No. CV-91-00367 - OWW
	)	
v.	)	
	)	
STATE FARM FIRE AND CASUALTY COMPANY,	)	
	)	
Defendant-Appellant.	)	
MARK RICHARDSON,	)	No. 92-16770
	)	
Plaintiff-Appellant,	)	D.C. No. CV-91-00367 - OWW
	)	
v.	)	
	)	
STATE FARM FIRE AND CASUALTY COMPANY,	)	**MEMORANDUM**[1]
	)	
Defendant-Appellee.	)	

Appeal from the United States District Court

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

for the Eastern District of California
Oliver W. Wanger, District Judge, Presiding

Argued and Submitted February 10, 1994
San Francisco, California

Before: ALARCON and FERNANDEZ, Circuit Judges, and HILL, District Judge.[2]

State Farm Fire and Casualty Company (SFFCC) appeals from the district court's grant of summary judgment in favor of Mark Richardson and the denial of its cross motion for summary judgment. Richardson cross appeals from the district court's award of interest on the judgment calculated at the federal rate.

On appeal, SFFCC contends inter alia that the district court's rulings on the cross motions for summary judgment are erroneous because the comprehensive personal liability insurance policy (homeowner's policy) issued by SFFCC provided no coverage for Richardson's injuries as a matter of law. We vacate the district court's judgment and remand with instructions to enter judgment for SFFCC because we conclude that, under California law, SFFCC's homeowner's policy provides no coverage for Richardson's injuries. We dismiss Richardson's cross appeal as moot. Because we conclude that, as a matter of law, there is no coverage under the SFFCC personal

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[2] Honorable Irving Hill, Senior United States District Judge for the Central District of California, sitting by designation.

liability insurance policy, we need not address the parties' remaining contentions.

I.

Richardson's complaint against SFFCC seeks (1) enforcement of a one million dollar stipulated judgment pursuant to section 11580(b)(2) of the California Insurance Code, Cal. Ins. Code § 11580(b)(2) (West 1964)[3] obtained against Linda Meaders (Meaders) in a personal injury action for injuries that Richardson sustained while repairing Meaders' van at her home; and (2) recovery of the one million dollar stipulated judgment as damages for SFFCC's breach of the implied covenant of good faith and fair dealing resulting from its bad faith failure to defend Meaders in the personal injury action, and to settle Richardson's claim within the limits of Meaders' homeowner's policy. Richardson filed the instant action to the California Superior Court. SFFCC removed the action to federal court based on diversity jurisdiction.

[3] Section 11580(b)(2) requires that insurance policies contain a provision that "whenever judgment is secured against the insured . . . in an action based on bodily injury . . .than an action may be brought against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment." Cal. Ins. Code 11580(b)(2) (West 1964). The stipulated judgment was partially satisfied by State Farm Auto Insurance's tender of its $25,000 policy limit.

At oral argument on the cross motions for summary judgment, the parties agreed that there were no genuine issues of fact in dispute, and that the legal issues to be resolved was the application of California's doctrine of independent concurrent causation. In a memorandum opinion, the district court concluded that the pleadings in the underlying personal injury action did not unambiguously exclude coverage under SFFCC's homeowner's policy and that the doctrine of independent concurrent causation applied. Accordingly, the district court ruled that SFFCC had a duty to defend Ms. Meaders against potential liability in spite of the exclusions set forth in the policy. The district court granted Richardson's motion for summary judgment, denied SFFCC's motion, and entered judgment in favor of Richardson.

II.

Richardson, a sixteen year old with drug and alcohol problems, sustained third degree burns to his upper torso during a fire that ignited while he was performing repairs to a vehicle owned by Meaders on April 30, 1988. Because Richardson had been having personal problems at home, Meaders permitted Richardson to stay at her home. She was aware of his alcohol and drug problems.

Richardson filed a personal injury action against Meaders alleging that Meaders negligently furnished alcohol to him immediately prior to the accident and negligently supervised his repair of the van. Meaders

tendered her defense to the carriers for both insurance policies. Meaders' automobile policy with State Farm Mutual Automobile Insurance Company (State Farm Auto) had a $25,000 policy limit; Meaders' homeowner's policy with SFFCC had a $300,000 limit.

State Farm Auto provided a defense and ultimately tendered its policy limits to settle Richardson's claim. SFFCC denied coverage, and refused to defend Meaders or to settle Richardson's claim for the limits of its policy. SFFCC relied in pertinent part on the motor vehicle exclusions in the homeowner's policy. The motor vehicle exclusions exclude coverage for injuries (1) "arising out of the ownership, maintenance, use loading or unloading of . . . a motor vehicle owned . . . by . . . any insured;" and (2) "arising out of" the entrustment to or negligent supervision of any person by any insured 'with regard to ownership, maintenance or use of any aircraft, watercraft, or motor vehicle. . . .'"

Richardson and Meaders thereafter entered into an agreement in which Meaders assigned to Richardson any claims she had against SFFCC and agreed to stipulate to the entry of judgment against her for one million dollars in exchange for Richardson's covenant not to execute the judgment against her. This action followed.

III.

The parties agree that the motor vehicle exclusions of the homeowner's policy preclude coverage for bodily injury arising out of the ownership or maintenance of a

motor vehicle and for negligent supervision or entrustment with respect to the ownership, maintenance or use of a motor vehicle. SFFCC contends that Richardson's accident arose out of the maintenance of Meaders' van, and the alleged negligent provision of alcohol is not an independent concurrent cause of Richardson's injuries. SFFCC argues that, if the allegedly covered risk of negligently serving alcohol to Richardson was a proximate cause of his injuries, it was inextricably bound with, and dependent upon, the excluded risk of maintaining the vehicle. Thus, the covered risk - negligent serving of alcohol - was not a concurrent proximate cause of Richardson's injuries that was independent of the excluded proximate cause - efforts to maintain the vehicle. We review a grant of summary judgment de novo and apply California law in the diversity action. West v. State Farm Fire and Casualty Co., 868 F.2d 348, 350 (9th Cir. 1989).

SFFCC asserts that the district court's erroneous ruling was based on an incorrect interpretation of the independent concurrent causation doctrine set forth in State Farm Mutual Automobile Ins. Co. v. Partridge, 10 Cal.3d 94 (1973). In Partridge, the insured negligently filed the trigger of a pistol, "creating an exceptionally dangerous weapon." 10 Cal.3d at 97. While Partridge and a friend were shooting jackrabitts out of the windows of a moving vehicle, they hit a bump. His gun discharged, and struck a passenger seated between Partridge and his friend. The passenger was paralyzed. Id. at 98.

The Supreme Court of California held that there was coverage under the homeowner's because "the liability of the insured arises from his non-auto-related conduct,

and exits independently of any 'use' of his car . . . ." Id. at 103. The court explained that both causes were independent of each other because "the filing of the trigger did not 'cause' the careless driving, nor vice versa. Both, however, caused the injury." Id. at 103 n. 10. The court concluded that when a non-automobile risk and an automobile risk constitute concurrent proximate causes of the accident, there is coverage under the liability policy. Id. at 106-07.

We agree with SFFCC that, under Partridge, neither the negligent supervision of Richardson's repairs nor his efforts to maintain the van were independent of the negligent furnishing of alcohol in causing Richardson's injuries. We are persuaded that Hartford Fire Ins. Co. v. Superior Court, 142 Cal.App.3d 406, 415 (1983) is controlling in this matter. Hartford involved a dispute between the insurance carrier of a yacht policy and the insurance carrier of a homeowner's policy. The carrier of the yacht policy argued that the aircraft exclusion provision in the liability policy was not applicable under Partridge because the pilot's negligent consumption of alcohol prior to his negligent operation of the aircraft was an independent concurrent cause of the aircraft crash. Id. at 415. The court held that the consumption of alcohol did not cause injury which was independent of the operation and use of the aircraft. Id. The court reasoned that consumption of alcohol alone was not negligent; only the act of piloting a plane while intoxicated could have given rise to the accident. Id. Thus, any damage caused while operating the aircraft under the influence of alcohol was wholly dependent on the operation of the airplane and Partridge did not apply. Id.

In this matter, the negligent furnishing of alcohol before Richardson began repairing the van did not cause any injury that was independent of the maintenance of the van or negligent supervision of the van. Richardson's injuries could not have happened unless he had been engaged in maintaining the van or was negligently supervised in doing so. See State Farm Fire & Casualty Co. v. Camara, 63 Cal.App.3d 48, 54-55 (1976) (insured's negligent design and construction of a dune buggy - a covered risk - was not independent of the negligent operation or use of the vehicle - the excluded risk - because the only way plaintiff could have been exposed to the design defect was through operation or use of the motor vehicle).

We hold that the district court erred in ruling that Meaders' homeowner's policy did not unambiguously exclude coverage for Richardson's injuries. There is no potential coverage for Richardson's injuries under the motor vehicle exclusions of the policy. Accordingly, under California law, SFFCC had no duty to defend Meaders. Hartford Fire Ins. Co. v. Superior Court, 142 Cal.App.3d at 417. The judgment of the district court is VACATED and this matter is REMANDED with instructions to enter judgment in favor of SFFCC. The cross appeal is DISMISSED as moot.

FILED: March 8, 1994

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK RICHARDSON,	)	No. 92-16755
	)	
Plaintiff-Appellee,	)	D.C. No. CV-91-00367 -
	)	OWW
v.	)	
	)	
STATE FARM FIRE AND CASUALTY COMPANY,	)	
	)	
Defendant-Appellant.	)	
MARK RICHARDSON,	)	No. 92-16770
	)	
Plaintiff-Appellant,	)	D.C. No. CV-91-00367 -
	)	OWW
v.	)	
	)	
STATE FARM FIRE AND CASUALTY COMPANY,	)	**ORDER**
	)	
Defendant-Appellee.	)	

Before: ALARCON and FERNANDEZ, Circuit Judges, and HILL, District Judge.[1]

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

The panel as constituted in the above-case has voted unanimously to deny the petition for a rehearing. Judge Fernandez has voted to reject the suggestion for a rehearing en banc. Judges Alarcon and Hill recommend the rejection of the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

FILED: April 15, 1994

EXCERPTS FROM STATE FARM HOMEOWNER'S POLICY

SECTION II - EXCLUSIONS

1. Coverage L and Coverage M do not apply to:

. . .

(e) **bodily injury** or **property damage** arising out of the ownership, maintenance, use, loading or unloading of:

. . .

(2) a **motor vehicle** owned or operated by, rented or loaned to any **insured**, or.

(f) **bodily injury** or **property damage** arising out of:

(1) the entrustment by any **insured** to any person;

(2) the negligent supervision by any **insured** of any person;

(3) any liability statutorily imposed on any **insured**; or

(4) any liability assumed through an unwritten or written agreement by any **insured**;

with regard to the ownership, maintenance or use of any aircraft, watercraft or motor **vehicle** (or any other motorized land conveyance which is not covered under Section II of this policy.